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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.,
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May plaintiffs be forever deprived of appellate review of an interlocutory order entered during the course of a class action and deciding a significant substantive issue, because the court of appeals believes that plaintiffs should have taken some unspecified action not required by any statute, Federal Rule of Civil Procedure or court order, such as seeking rehearing of, or a permissive appeal from, the interlocutory order, earlier than they did?

2. If a court of appeals ever could permanently deprive plaintiffs of their right to appellate review of an interlocutory order, could it do so and disturb the district court's administration of a class action, when the district court which was most familiar with the procedures followed and the diligence and timeliness of the parties' conduct in that court, perceived no delay, decided the issue on the merits and stated that it should be decided on appeal?

PARTIES TO THE PROCEEDINGS

(a) Petitioner Liane Buix McDonald is a plaintiff, representing a class of female United Air Lines flight attendants. She was an appellant in the court below.

(b) Respondent United Air Lines, Inc., a corporation, is a defendant. It was an appellee in the court below.

(c) Respondent Association of Flight Attendants intervened in the district court to represent the interests of incumbent United Air Lines flight attendants. It was an appellee in the court below.

(d) Carole Anderson Romasanta, and eleven other named individuals,[1] were respectively the original named plain-

[1] Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles and Joanne Hamersley.

tiff and subsequent intervenors who obtained relief. A final judgment as to them was entered in 1975, and thereafter petitioner McDonald has represented the class.

(e) Petitioners Mary Arlene Lemley, Sharon McCoy Bingham, Irene M. Bondurant, Patricia Ellen Hodiak, Linda Williams Andrews, Deanna Dorsey Schulze, Lynn Runyon Overton, and Marceilla Brown Brown were claimants to reinstatement in the court below. As to each, a special master recommended that they be denied reinstatement, and the district court adopted the recommendation. The court of appeals affirmed the district court as to Mary Arlene Lemley, Sharon McCoy Bingham, Irene M. Bondurant, Patricia Ellen Hodiak, Linda Williams Andrews, and Deanna Dorsey Schulze and vacated and remanded for further proceedings as to petitioners Lynn Runyon Overton and Marceilla Brown Brown.

(f) Barbara Thomas Notch, an appellant below, also had received an adverse recommendation from the special master, which was adopted by the district court. The court of appeals reversed this ruling and ordered her reinstated.

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LIANE BUIX McDONALD
on her own behalf and on behalf
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Petitioner,

v.

UNITED AIR LINES, INC.,
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ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Liane Buix McDonald, on her own behalf and as representative of a class of female flight attendants whose employment with Respondent United Air Lines was terminated because of the employer's discriminatory "no-marriage" rule, and Mary Arlene Lemley, Sharon McCoy Bingham, Irene M. Bondurant, Patricia Ellen Hodiak, Linda Williams Andrews, Deanna Dorsey Schulze, Lynn Runyon Overton and Marceilla Brown Brown who sought and have been denied reinstatement to that position, petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The Memoranda and Orders of the United States District Court for the Northern District of Illinois which were the

subject of the Appeal were entered on October 27, 1982, September 9, 1983, January 5, 1984 and February 1, 1984. (App. 34a, 20a, 29a, 33a.)[2] The recommendations of special masters were entered prior to the district court's opinions. (App. 41a-84a.) The Opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a), and its Judgment (App. 87a), were entered on September 28, 1984.

The pertinent earlier opinions in this case or related cases include the following:

1. *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (these decisions established that respondent United's "no-marriage" rule violated Title VII of the Civil Rights Act of 1964);

2. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977), *aff'g Romasanta v. United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *rev'g* unpublished Order (N.D. Ill., Oct. 4, 1975) (the appellate decision held that petitioner should have been granted leave to intervene for purposes of appealing denial of class certification); and

3. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), *rev'g* unpublished Order (N.D. Ill. March 1, 1978) (the appellate decision held that the class should be defined, as requested by petitioner, to include all persons damaged by the no-marriage rule (within certain time limits)).

4. *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), *cert. denied*, — U.S.—, 104 S.Ct. 1928 (1984) (affirming the district court's ruling that class members on reinstatement receive no retroactive seniority for competitive bidding purposes, but receive full retroactive seniority for compensation and benefits).

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[2] "App." refers to the Appendix to this Petition.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on September 28, 1984 (App. 1a, 87a). A timely Petition for Rehearing was filed on October 12, 1984 and denied on December 5, 1984 (App. 86a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(3).

STATUTORY PROVISION

The pertinent provision of Rule 53(c) of the Federal Rules of Civil Procedure reads as follows:

> (c) Powers. The Order of Reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all the matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the Order of Reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

STATEMENT OF THE CASE

This petition presents issues as to the rights of members of a class to appellate review on entry of a final order of interlocutory orders entered during the course of the action. The district court in the first interlocutory order, an Order of Reference under Federal Rule of Civil Procedure 53(c) to special masters hearing claimants seeking reinstatement in the remedial phase of this class Title VII case, had as it later explained placed the burden of persuasion throughout the hearing on the claimant (App. 34a). Then, when considering the first objections to reach it from the masters' recommendations against certain claimants' reinstatement, that court in further interlocutory orders reconsidered, in part modified but in pertinent part reaffirmed the allocation of the burden of proof (App. 21a). On appeal the Seventh Circuit held that the right to appellate review of these interlocutory rulings had been lost by petitioners — several of the unsuccessful claimants before the masters and the class representative — because they had not sought interlocutory review by the court of appeals or district court reconsideration of the allocation of proof before the hearings began (App. 9a).

The underlying action here was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and attacked the rule of Respondent United Air Lines which required the termination of any female flight attendant who married. The illegality of United's rule had been determined in a related case, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), and this suit was filed on behalf of a class of former flight attendants, ultimately certified and remanded for entry of appropriate relief. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).[3] Thereafter, the district court determined that relief to eligible claimants includ-

[3] Much of the earlier procedural history is summarized in the Opinion of this Court in *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977).

ed an offer of reinstatement. *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1928 (1984).

Approximately 1700 claimants to relief were identified, and the district court determined to utilize individual evidentiary hearings before special masters appointed under Federal Rule of Civil Procedure 53 to determine whether a particular claimant was entitled to reinstatement (R. 416).[4] It then asked the parties for suggestions on an Order of Reference to govern the hearings (R. 416). With regard to the allocation of proof, the class urged that after a *prima facie* showing of entitlement to relief by a claimant, the burden of persuasion shifted to respondent United as the adjudicated wrongdoer (R. 473 at 3-9, S.A. 1, S.A. 4). Respondents argued that the burden of persuasion remained on claimants throughout (R. 445).

On October 27, 1982 the district court issued its Order of Reference pursuant to Rule 53(c) without accompanying discussion (App. 34a). The Order provided (¶ 4) that the "claimant has the burden of proving that she is a member of the class" (App. 36a). It further provided (¶ 5), as the class had sought, that a claimant made out a *prima facie* case by demonstrating that her flight attendant employment ended with United within 90 days of her marriage while the mandatory termination no-marriage rule was in effect (App. 36a). The Order further provided (¶ 5) that thereupon "those opposing reinstatement will have the burden of going forward with a showing that some reason other than the no-marriage rule led to the end of her employment as a flight attendant" (App. 36a).

In January, 1983 eight "test" hearings were set to be heard by the presiding special master (R. 1237 at 1). Before the hearings began, respondent AFA in a motion to reconsider the Order (in which respondent United joined) asked the district

[4] "R.", "S.R." or "S.A." cites to portions of the record on appeal.

court to modify the Order of Reference by eliminating its provision in Paragraph 5 that a claimant made out her *prima facie* case on demonstrating she left United within 90 days of her marriage when compelled to do so by the rule (R. 682). United joined in the motion, noting that paragraph 5 was susceptible to a reading that the burden of persuasion, not just the burden of going forward, shifted to respondents on the *prima facie* showing (R. 684 at 2). The class urged this reading when the test cases began in January, 1983 (R. 1237 at 9-11).

The motion to reconsider was still pending when the eight test cases were heard, as well as when the hearings began on a regular basis in April, 1983 (R. 1238, Vol. 3). In May, 1983 the district court addressed the motion to reconsider and orally ruled that defendants were correct to the extent that the burden of persuasion remained on the claimant throughout (R. 1239, Vol. 4 at 4-6). In stating this, it relied for the first time on *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Thereupon, the class prosecuted a consolidated objection to the district court from nine of the adverse masters' recommendations, bringing the allocation of proof provisions of the Order of Reference before the district court for further consideration in light of the court's May, 1983 oral ruling and its reliance on *Burdine* (which petitioners considered inapplicable at the remedial stage of Title VII litigation). In a written decision issued September 9, 1983 (App. 21a) the district court fully reconsidered its burden of proof decision. It agreed with the class that its reference to *Burdine* was "insufficient and perhaps misleading" (App. 22a). It modified its Order so that the burden of persuasion shifted in the limited instance of a claimant who demonstrated in her *prima facie* case that she had been discharged by United on refusing to resign as the rule required (App. 22a-23a). However, for the rest of the claimants (who comprise the vast majority and included the petition-

ers now before the court), those who resigned as required by the mandatory rule on marriage, the court refused to change its prior ruling and held that the burden of persuasion remained on the claimant throughout the hearing (App. 23a).

On the same date the district court adopted adverse recommendations as to a number of claimants applying the burden of proof standards it had simultaneously announced (App. 30a). Petitioners then prosecuted appeals from the adverse rulings to the court of appeals under 28 U.S.C. 1292(a)(1) as orders denying them the injunctive relief of reinstatement or, alternatively, under Rule 54(b) having obtained the required certificate for interlocutory review from the district court (R. 1100, S.R. 1239, Vol. 6 at 8, 9). In granting the certificate under Rule 54(b), the district court stated that it welcomed appellate review at that time (S.R. 1239, Vol. 6 at 8-9, Tr. Nov. 3, 1983).[5]

In the decision which petitioners now ask this Court to review, the court of appeals recognized that a substantial issue was presented as to whether *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), or the *Burdine* decision, provided the appropriate model for allocation of the burden of persuasion here (App. 7a-9a). However, the court then held that petitioners were not entitled to appellate review of the issue (App. 9a). The court stated that the meaning of paragraphs 4 and 5 of the Order of Reference seemed clear, and the class had lost its right to appellate review because it had failed to seek either interlocutory appellate

[5] Thereafter, the class prosecuted a second consolidated objection to the district court involving six claimants as to whom adverse recommendations had been rendered by the masters (R. 1121). In orders of January 5; 1984 and February 3, 1984 the district court affirmed five of the six claims, which were also appealed to the Seventh Circuit (R. 1201). By order of February 16, 1984 the Seventh Circuit granted the class' request to consolidate the two appeals and to set an expedited argument date.

review of the question or reconsideration in the district court before the hearings began (App. 9a). It noted that since appellate consideration at this time would require, if petitioners were correct, rehearing in a number of cases, review would "not further the goal of efficient judicial administration" (App. 9a). It then held that it would review the individual decisions denying reinstatement to the extent appellant claimants were challenging the manner in which the principles announced in the Order of Reference were applied, as distinct from the substance of the Order itself (App. 9a). It reversed outright as to one claimant, remanded as to two for further proceedings and affirmed as to six (App. 17a). These eight individual claimants, as well as the class representative, are petitioners now before the Court.

REASONS FOR GRANTING THE WRIT

I. AD HOC RESTRICTION OF APPELLATE JURISDICTION FOSTERS PIECEMEAL APPEALS AND IS INIMICAL TO HISTORIC POLICIES OF THE COURT

The judgment deprives petitioners of appellate review concerning the correct burden of proof governing their individual reinstatement hearings in a case where the employer's wrongdoing has been established. While this is of critical importance to petitioners, the decision below is worthy of this Court's review since it leaves parties in complex litigation with no choice: they must seek appellate review of clearly interlocutory orders issued during the case lest they find they have in the name of "efficient administration of justice" lost their right to appellate review (App. 9a). The policy applied below is in direct conflict with "the historic federal policy against piecemeal appeals", *Sears Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956), cited with approval in *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980); *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). Moreover, appellate

courts have no more power to restrict than they have to expand their jurisdiction. *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). As this Court there noted, "Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Id.* at 181. The decision, which places in peril all claimants and unsettles longstanding black letter rules as to when they must act to preserve their appeal rights, should be reviewed by this Court.

Even though the court of appeals found the allocation of the burden of persuasion to be a significant issue (App. 7a-9a), it denied appellate review of orders setting (and then explicating and modifying) the burden because the class had not sought reconsideration in the court below before the hearings began or sought to take "a direct timely" appeal to that court earlier (App. 9a). However, the October, 1982 Order of Reference to the special master under Rule 53(c) which set the burden of proof was an unappealable, interlocutory order. *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 290-91 n. 4 (1940); *Rexford v. Brunswick-Balkie-Collender Co.,* 228 U.S. 339 (1913); *Teamsters Jt. Welfare Fund v. Nolan,* 549 F.2d 871, 872-73 (2d Cir. 1977); *Mabey v. Regan,* 537 F.2d 1036, 1041 & n.6 (9th Cir. 1976). Such orders of reference can be and are brought up for review when the district court issues a final judgment adopting or rejecting the masters' recommendations. *Deckert, supra,* 311 U.S. at 291. *E.g., United States v. Cline,* 388 F.2d 294 (4th Cir. 1968).[6] Moreover, any appeal before then would have surely been premature since the Order of Reference was not finally settled before the hearings started, but instead was considered, explained and in part

[6] Here, the class in fact did not wait until the completion of the entire litigation. Rather, they sought appellate review as soon as available under 28 U.S.C. 1292(a)(1), when the first recommendations denying the injunctive relief of reinstatement were adopted by the district court.

modified by the court on two occasions.[7]

This Court on a number of occasions has reiterated the historic policy against piecemeal appeals. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 377-78 (1981). Even when interlocutory review is available, it is optional: no case should hold as this one does that the failure to take an interlocutory appeal (whether permissive or as of right) results in a forfeiture of review when the order became appealable as of right. Indeed, it is hornbook law that a party aggrieved by an interlocutory order is not required to attempt to take an interlocutory appeal — even one the party has by right — to protect its rights:

> and, where it is not taken, [that] does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. The aggrieved party may,

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[7] A motion to reconsider the Order of Reference filed by respondent AFA was pending when the hearings began on a regular basis in April, 1983. Respondent United, in joining the motion, noted that paragraph 5 of the Order was susceptible to a reading that on a claimant's *prima facie* showing the burden of persuasion, not just the burden of going forward, shifted to respondents (R. 684 at 2), a reading urged by petitioners when the hearings began. (R. 1237 at 9-11). The court orally ruled on the motion for reconsideration in May, stating that as in *Burdine* the burden of persuasion would remain on the claimant throughout the hearing (R. 1239, Vol. 4 at 4-6). The class then sought further consideration of this issue in prosecuting the first objections to adverse masters' recommendations. The district court in its September 9, 1983 opinion fully reconsidered the allocation of the burden of persuasion. It found its prior invocation of *Burdine* "insufficient and perhaps misleading" (App. 22a), and for the first time detailed the grounds for its allocation decision, in part modifying the Order's allocation (as to claimants who were fired on refusing to resign) but reaffirming it as to those like petitioners who obeyed the discriminatory rule and resigned as required on marriage (App. 22a-23a).

> therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case.

Victor Talking Machine Co. v. George, 105 F.2d 697, 699 (3d Cir.), *cert. denied,* 308 U.S. 611 (1939). *Accord, In re Chicken Antitrust Litigation,* 669 F.2d 228, 236 (5th Cir. 1982).[8] However, under the rule announced by the court below (which cited no cases for its ruling), parties have no choice in extended cases but to seek appellate review by mandamus or by permission of important interlocutory orders, thereby engendering the very multiplicity of protective appeals deplored by this Court in *Baltimore Contractors, supra. See also White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445, 453 (1982). Cf. *McDonald,* 432 U.S. at 394 n.15.

The issues which the court below held had been lost to review are of crucial importance to petitioners. As both the district court (App. 31a) and the Seventh Circuit observed (App. 8a), at issue in the interplay of marriage, the end of flight attendant employment and the mandatory termination on marriage rule are imponderables: since the rule was mandatory, all are dealing in "what would have beens." Each petitioner here had in her case in chief linked her termination to the mandatory no-marriage rule. The district court in the September 9th ruling that the court of appeals held unreviewable said that because the claimant had "resigned" (as the mandatory rule required) rather than insisted on being fired she had the burden of persuasion throughout (App. 22a-23a). Because of the ruling below, claimants lost their right to appellate consideration of whether under *Teamsters* this determination is correct or whether the proven wrongdoer, rather than the innocent claimant, should bear the burden of inevitable specu-

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[8] Nor is the taking of "formal exceptions to rulings or orders of the court" a prerequisite for appeal. Fed.R.Civ.P. 46. Similarly the filing of motions for reconsideration is not required prior to the taking of an appeal. *See Franki Foundation Co. v. Alger-Rau & Associates, Inc.,* 513 F.2d 581, 587 (3d Cir. 1975); *Sherrill v. Royal Industries, Inc.,* 526 F.2d 507, 509 n.2 (8th Cir. 1975).

lation and imprecision in this reconstruction as other post-*Teamsters* cases have consistently required.[9]

This Court has recognized that the allocation and quantum of proof traditionally has been "left to the judiciary to resolve . . . ." *Woodby v. INS,* 385 U.S. 276, 284 (1966). This resolution is to be guided by "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer,* 455 U.S. 745, 755 (1982); In re *Winship,* 397 U.S. 358, 371-73 (1970) (Harlen, J., concurring). The arguably incorrect allocation of proof which the court of appeals here refused to review in the name of "efficient judicial administration" occurred in the remedial phase of class Title VII litigation, an area where this Court has stressed society's interest that the judiciary fashion the fullest remedy available under the circumstances. *Franks. v. Bowman Transportation Co.,* 424 U.S. 747, 763-64 (1976).

Despite these obligations, the appellate court denied review, even though the district court was clearly aware that rehearings might be required when it fully considered petitioners' challenge to the allocation of proof and then stated that it welcomed appellate review as and when sought by petitioners (S. R. 1239, Vol. 6 at p. 8-9 Tr. Nov. 3, 1983). Moreover, respondents acknowledged that the interlocutory orders here were subject to appellate review and correction at the conclusion of the litigation on entry of a final judgment (AFA's Court of Appeals brief at 1). Even on its own terms the stated concern of the court below for efficient judicial administration is overbroad if applied to the approximately 800 claimants who have not yet had hearings since appellate correction of the

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[9] *See Richardson v. Byrd,* 709 F.2d 1016, 1021 (5th Cir.), *cert. denied* —U.S.—, 104 S.Ct. 527 (1983); *McKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C. Cir. 1982); *Association Against Discrimination v. City of Bridgeport,* 647 F.2d 256, 289 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982).

burden of persuasion would not entail rehearings as to them.[10] In sum, no circumstances warranted the refusal of the court below to reach the issue on the proper burden of persuasion. If even one case were decided under the wrong burden of proof, that is an egregious error that requires appellate correction and rehearing under the proper standard. This Court should correct the refusal to review and remand for appellate consideration of the allocation question.

The "ad hoc" reduction of appellate jurisdiction by the court below here is both unwarranted and improper. Requiring attempts to obtain review of clearly interlocutory orders in extended litigation lest review be lost is inimical to the historic policy against piecemeal appeals and contrary to the effective administration of justice. By enforcing its policy by the loss of appellate review, the court below improperly restricted its jurisdiction. Certiorari should be granted so that this Court's historic policies can be reaffirmed.

II. THE COURT OF APPEALS' UNWARRANTED ACTION INTERFERED WITH THE DISTRICT COURT'S MANAGEMENT OF COMPLEX CASES

The case raises an important issue of the court of appeals' interference with the district court's management of complex litigation. Even if the court of appeals could reduce its jurisdiction and deprive petitioners of their right to appeal an interlocutory decision on entry of final judgment, its ruling here invaded the discretion vested in the district court to manage complex and extended class litigation such as this and eroded the division of functions between the district court and the court of appeals which this Court has been careful to preserve.

The management of complex class litigation, particularly in the equitable relief phase of Title VII litigation, is customa-

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[10] The hearings process as to these claimants has been stayed until at least July 1, 1985 while the district court completes action on certain matters relating to the distribution of an award of classwide back pay.

rily the province of the district court. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 375-76 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763, 770 (1976).[11] Moreover, this Court has stressed that in the timing of interlocutory review the district court acts as a "dispatcher," in whose sound discretion rests the determination of the "appropriate time" when multiple parts of a complex action are ready for appeal. *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8 (1980) (Rule 54(b)); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 474 (1978) (district court has similar function under 28 U.S.C. § 1292(b)). Here, the district court concurred with petitioner that the instant appeals should be taken. Indeed, in granting petitioners a Rule 54(b) certificate it noted that it "too" thought "the burden of proof issue ought to be decided on appeal" at that time and expressly held that the "hearings keep going at the maximum number we can do." (S.R. 1239, Vol. 6 at 8-9, Tr. Nov. 3, 1983.) Thus, it was the district court actively managing this complex case that authorized interlocutory review while continuing the hearings, even though it was aware that if petitioners succeeded on appeal a number of rehearings would be required. Nonetheless, the court of appeals concluded that the district court's management plan--continuing review and refinement of the Order of Reference in light of the experience in actual hearings—was contrary to "efficient judicial administration," and then imposed a forfeiture of appeal rights on petitioners as the penalty (App. 9a).

This Court has noted that issues as to the proper allocation of functions between the district and appellate courts are important, and that it will preserve the district court's discretionary case management authority when undercut by the

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[11] Indeed, the court of appeals here when affirming the district court's denial of retroactive competitive seniority in this case explicitly deferred to the district court and employed an abuse of discretion standard in reviewing the remedy it had fashioned. *Romasanta v. United Air Lines, Inc.,* 717 F.2d 1140, 1148-49 (7th Cir. 1983), *cert. denied,* —U.S.—, 104 S.Ct. 1928 (1984).

court of appeals. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 417-18 (1977); *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 665-66 (1978); *Curtiss-Wright, supra.* The district court of course was fully aware of the course of proceedings, including how and when the parties had presented their positions on burden of proof issues and the need for rehearing if petitioners were correct on their request that the burden of persuasion shift to the wrongdoer on proof of a *prima facie case.*[12]

The court of appeals, however, did not even find that the district court had abused its discretion in giving further consideration to the allocation of proof while the hearings were in process; it applied no such standard (App. 1a-19a). If there were any qualifications to class members' rights to prosecute challenges to interlocutory orders upon a final judgment then at the least this Court should insist that the court of appeals give due respect to the district court's views, and not substitute their own *ad hoc* judgment as to what will best serve judicial economy in the circumstances.[13] Just as this Court in the past has reviewed and revised comparable intrusions into district court's discretion, *Dayton Board of Education, supra, Curtiss-Wright, supra, Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 252 (1981), it should do so here.

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[12] Here the district court found no procedural default, but even in instances where a default has been excused the appellate court will customarily review the merits of the decision where the lower court has fully decided an issue. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 255-256 (1981); *Com'r of Internal Revenue v. Gordon,* 391 U.S. 83, 95 n.8 (1968).

[13] The court of appeals' intrusion here was exacerbated since no party had suggested to that court that there had been a forfeiture of appellate review of the interlocutory order and the issue was neither ruled on or argued. As a result, the class had no notice that by starting the hearing process in this long-delayed case they had acquiesced in that which they consistently maintained was an incorrect and highly prejudicial allocation of the burden of persuasion.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-3013 and 84-1237

LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., a corporation,

Defendant-Appellee,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1157—**James B. Moran**, *Judge.*

ARGUED JUNE 6, 1984—DECIDED SEPTEMBER 28, 1984

Before CUDAHY, EDWARDS*, and ESCHBACH, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This appeal is but the latest step in the long and tortuous attempt by former United Airlines ("United") stewardesses to obtain a remedy for

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* Honorable George Clifton Edwards, Jr. for the Sixth Circuit, is sitting by designation.

sex-based discrimination. This discrimination was engendered by United's former rule which required that all female flight attendants resign their jobs upon marriage. While the rule itself was abrogated in 1968 and its illegality was definitively determined in 1971, litigation to determine the precise form of relief and the membership of the plaintiff class has continued and appears likely to continue for some time into the future.[1] This appeal concerns the proceedings below by which the claimants are required to establish in adversarial hearings conducted by special masters that they are members of the plaintiff class. The claimants must show that they either were fired or forced by United to resign or that they resigned because of the no-marriage rule. By this showing they would become entitled to reinstatement as flight attendants with the forms of competitive and company seniority previously awarded by the district court and affirmed by this court. *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1928 (1984).

Two appeals are in fact involved at this stage. The first involves primarily the interpretation of an order issued by Judge Moran on November 9, 1983, clarifying the Order of Reference of October 29, 1982 to the special masters. The Order of Reference set out the legal principles which the masters are to follow in conducting the hearings and determining each claimant's right to be considered part of the class. This first appeal also involves a group of claimants as to whom adverse reinstatement recommendations from the masters were affirmed by the district court. The district court granted plaintiffs a Rule 54(b) certificate and also noted that its decision was appealable under 28 U.S.C. § 1292(a)(1) as an order denying an injunction. The second appeal involves the district

[1] For a fuller discussion of the history of this litigation and the decided cases, see *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1142-44 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1928 (1984).

court's subsequent affirmance of the masters' adverse recommendations with respect to an additional five claimants and its entry of an order allowing an appeal for this second group under 28 U.S.C. § 1292(a)(1) as well as pursuant to a Rule 54(b) certificate. Both of these appeals were later consolidated.

Appellants raise two issues. First, they challenge the principles involving allocation of the burdens of proof and production as contained in the Order of Reference and as clarified in the November 9, 1983 order. Second, appellants challenge the manner in which the masters have applied these principles to individual claimants, in particular the nine claimants whose appeals are now before this court. For the reasons stated below, we affirm in part, reverse in part and remand to the district court for further proceedings, as necessary, which are not inconsistent with this opinion.

I

The plaintiff class had originally proposed in 1980 the use of an affidavit procedure to determine whether a particular claimant was entitled to be a member of the class. The district court, however, rejected this procedure and decided to utilize adversary hearings to be presided over by special masters to determine the status of individual claimants. The Order of Reference issued by the district court set out legal principles involving primarily evidentiary considerations which the masters were to apply in formulating their recommendations to the district court concerning reinstatement. The district court also apparently limited the masters' hearings to the determination of entitlement to reinstatement and excluded the issue of eligibility for backpay. The relevant provisions of the Order of Reference include the following:

Principles

4. Only a claimant who resigned or was terminated as a United flight attendant between July 29, 1965 and November 7, 1968 (the "class period") is eligible

to attempt to prove that she is a member of the class. The claimant has the burden of proving that she is a member of the class.

5. When an eligible claimant proves she was married at the time of her [r]esignation or termination, or that she married within 90 days after her resignation or termination, those opposing reinstatement will have the burden of going forward with a showing that some reason other than the no-marriage rule led to the end of her employment as a flight attendant.

6. Some indication[s] that an eligible claimant may have resigned or been terminated because of the no-marriage rule are the following:

(a) she concealed her marriage and continued to fly; or

(b) she on marriage sought transfer to ground employment with United; or

(c) she sought other employment before or within 90 days after her termination or resignation; or

(d) she is found by the Special Master to have made contemporaneous protests to her supervisor or United management about her dissatisfaction with the no-marriage rule.

7. Some indication[s] that an eligible claimant may have resigned or been terminated for a reason other than the no-marriage rule are the following:

(a) she gave United a reason inconsistent with the no-marriage rule as the reason for her resignation or termination; or

(b) she failed to apply for a transfer with United, to seek other employment outside the company, or to apply for unemployment compensation at or about the time of her resignation or termination.

Following issuance of the Order of Reference, the defendant, United Air Lines, Inc., and the intervenor, the Association of Flight Attendants ("AFA"), asked the district court to reconsider the provisions of the Order of Reference which concern the allocation of burdens of proof and production during the hearings. In its memorandum to support its motion to reconsider the Order of Reference, AFA argued that paragraph 5 should be eliminated and the claimant's marital status at the time of termination or resignation merely added as an additional factor to be considered under paragraph 6. AFA based its argument primarily on the fact that the burden of proof was to remain always on the claimant as the "law of the case" established in a prior Seventh Circuit decision. That decision stated in a footnote: "The stewardesses who resigned must, as counsel for the plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978).

The class opposed the motion to reconsider primarily on the ground that, under an analogy to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the "burden" or "burden of explanation" shifts to the employer once the claimant makes a threshold showing of discrimination. According to the plaintiff class, this interpretation of *Teamsters* was consistent with the footnote quoted above from *McDonald* because "the footnote, in plaintiffs' view, says only that the burden of persuasion that the termination is because of the [no marriage] rule stays on the claimant." R. Doc. 685 at 3. It thus seems clear that the plaintiffs interpreted the Order of Reference to shift only the burden of production, and not the burden of proof, to the defendant once the claimant has made the threshold showing. This, of course, is consistent with paragraph 4 of the Order of Reference which explicitly states that the claimant has the burden of proving she is a member of the class. At no point prior to initiation

of the appeals from the masters' determinations did the plaintiff class apparently challenge, even indirectly, paragraph 4 of the Order of Reference.

In their appeal to Judge Moran from the masters' adverse determinations, the class asserted that, in line with *Teamsters*, once the claimant makes a prima facie showing, the employer has the burden of proving by clear and convincing evidence that its illegal policy was not the cause of the stewardess' termination. In his November 1983 order, however, Judge Moran rejected the application of this principle to the claimants primarily on the ground that those stewardesses who resigned (as opposed to those who were discharged by United upon marriage) were similar to the nonapplicants in *Teamsters* who had the burden of proving that they were actual discriminatees and thus entitled to be treated like the rejected applicants who were presumptively entitled to relief.[2] Judge Moran then concluded that "the manner and burden of proof is not the same for all the varying circumstances in Title VII cases. It must be tailored to the realities of the case, including how the evidence could or would be presented." In addition, however, he referred approvingly to the model "suggested, but not mandated," by the decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Much of the argument concerning the proper allocation of burdens centers on whether the case before us should follow the *Burdine* model, the *Teamsters* applicants model or the *Teamsters* nonapplicants model. *Burdine* set

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[2] The plaintiff class has referred to the statement in *McDonald*, 587 F.2d at 360, that those stewardesses who were fired should be treated the same as those who resigned involuntarily. This statement is undoubtedly correct but does not conflict with the principle that resignees must carry the burden, in order to be considered class members, of proving that they did resign involuntarily. Once resignees achieve class status, they are and should be treated the same as those who were fired.

out a structure in which the plaintiff first establishes a prima facie case of discrimination which creates a factual presumption that the employer unlawfully discriminated. *Id.* at 254. The burden of producing evidence to rebut this presumption then shifts to the employer who must articulate a valid reason for having rejected the plaintiff. If the defendant meets this burden, then the burden of production shifts back to the plaintiff to show either that the employer was motivated by a discriminatory reason or that the proffered explanation is unworthy of credence. *Id.* at 254-56. The burden of persuasion, however, remains on the plaintiff to defeat the employer's showing of a nondiscriminatory reason.

As even Judge Moran recognized, the reference to *Burdine* in the present context is "insufficient and perhaps misleading." The entitlement hearings are clearly a different stage of proceedings than that at issue in *Burdine* because the former stewardesses need not carry any burden of proving that the defendant United Air Lines acted illegally. The illegal discrimination embodied in the "no-marriage" rule has been established and is no longer at issue. However, this prior adjudication did not, of course, identify exactly who was injured by this illegal conduct, and only those who were in fact injured are entitled to relief.

The issue presented by these entitlement hearings is thus much closer to the issue in *Teamsters* where the illegality of the challenged practice had also been previously determined than to *Burdine*. The issue in *Burdine*, of course, was whether discrimination had actually occurred. The issue in both *Teamsters* and the present case is the method to be used in determining who belongs to the plaintiff class, that is, who has been a victim of the proven discrimination. In *Teamsters*, the Court stated that those blacks who had applied for line-driver positions were presumptively to be treated as discriminatees. The employer could rebut the presumption only by showing that the applicant had been rejected for nondiscriminatory reasons. On the other hand, those who did not apply but

claimed they were discouraged because of the employer's well-known discriminatory policy had to carry the burden of proving that they would have applied but for the policy.

The stewardesses who resigned their positions in temporal proximity to their marriages and who did not file union grievances or EEOC charges are in fact directly comparable to neither group in *Teamsters*. They are closer to actual discriminatees than the *Teamsters* nonapplicants because their contemporary inherent interest in and qualification for the position of stewardess (once marital status is removed from consideration) are unquestioned. On the other hand, unlike the *Teamsters* applicants or those stewardesses who were fired, it may be virtually impossible to know now what the actual intention and motivation of some stewardesses were at the time they resigned their positions. Of course, the claimants need only establish by a preponderance of the evidence that they resigned as a result of the rule.

The parties also dispute which *Teamsters* model is more applicable based on whether a resignation caused by the existence of the rule should be considered an employment decision of United Airlines or a decision of the former stewardesses. It is not necessarily useful to the analysis, however, to dwell on a characterization of a coerced resignation or a resignation in response to the no-marriage rule as being the stewardess' own employment decision. It was, after all, the defendant's employment decision to have an illegal policy. The issue is only whether the illegal rule was the cause-in-fact of the resignation.

In the final analysis, it is perhaps most useful only to recall the maxim that each Title VII case may be unique to its own factual setting and therefore courts must be prepared to employ innovative procedural structures in facilitating the necessary determinations. *Burdine*, 450 U.S. at 253-54 n.6.

In this connection, we do not need to consider the particulars of the Order of Reference because the meaning of paragraphs 4 and 5 seems abundantly clear and the class

failed to object to the Order when it had ample opportunity to do so before the beginning of the individual hearings.[3] Judge Moran's subsequent order, despite the perhaps ambiguous references to the *Burdine* model, did not significantly change the allocation of burdens enunciated in the Order of Reference. Hence, to give the plaintiff class the relief requested from the November 1983 order would also require modification of the previous Order of Reference. To permit the plaintiffs to wait to challenge the Order until after several hundred hearings have been held and then to attempt to force rehearings on those claims which received adverse recommendations does not further the goal of efficient judicial administration. If, however, the plaintiffs had presented a direct and timely challenge to the allocation of the ultimate burden of proof in the Order of Reference, we would have had to consider carefully the principle that the proven wrongdoer must frequently bear the burden of persuasion. Insofar as the plaintiff class is instead challenging the manner in which the principles of the Order of Reference are *applied* in specific cases either by the masters or by Judge Moran, we must pursue a different line of analysis. We turn next to this problem.

II

A

As previously discussed, the Order of Reference places the initial burden of production on the claimant, who can

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[3] By not reaching the merits of the Order of Reference, we need not express any opinion on the appropriateness of such a procedure in determinations of class membership in future Title VII cases. Given the unique characteristics of these claimants and their differences from the usual Title VII claimants in that they already held the employment positions which they wished merely to retain, the affidavit procedure originally suggested by the plaintiff class might conceivably have had some merit. However, the class did not and does not now challenge the use of adversary hearings and we thus see no error in adopting this procedure.

establish her prima facie case by demonstrating a temporal link between her termination as a stewardess and her marriage. Paragraph 6, in addition, lists several factors, such as subsequent employment, which are considered probative of her intent to continue employment but for the no-marriage rule. Once the claimant has met her initial burden, the burden of production shifts to the defendant to rebut the factual presumption that the claimant resigned because of the rule, although the ultimate burden of persuasion remains on the claimant. The following discussion of appropriate procedures is not based on *Burdine*, which, as previously noted, specifically involved the liability phase. It is, instead, based on paragraphs 4 and 5 of the Order of Reference but uses the *Burdine* explanation of the shifting of burdens as a recent application of burden-shifting by the Supreme Court.

In *Burdine*, the Court stated that, once the burden of production shifted, the defendant needed only to articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff. However, this explanation cannot be a mere pretext but, rather, "must be legally sufficient to justify a judgment for the defendant." 450 U.S. at 255. It must be based on admissible evidence and not merely an answer to the complaint or argument of counsel. *Id.* at 255 n.9. While creating fine distinctions about the allocation of burdens is often a pointless judicial exercise, in the present case, where the final determination often comes down to a "swearing match," the allocation of burdens may be decisive. It is therefore necessary to emphasize that where United and AFA have not come forward with any evidence—whether based on extrinsic factors such as the claimant's subsequent employment history or on impeachment through cross-examination of the claimant herself—the defendant will have failed to rebut the presumption established by the claimant's prima facie case.

A mere recitation of defendant's rote contention that the stewardess' resignation was not the result of the no-marriage rule or a general denial of the stewardess' factual allegations would not seem sufficient to meet the de-

fendant's burden of production. The master, of course, can make a determination that the claimant's professed past intention to continue her employment is not credible. Nevertheless, the master's determination should be based on specific evidence adduced by United or AFA, whether by cross-examination or otherwise. If such evidence is not available in any form, then the master should conclude that the defendant has failed to meet its burden and thus also failed to rebut the factual presumption that the claimant's resignation was the result of the no-marriage rule.

Further, the masters and, in turn, the district court in adopting the findings of the masters are, of course, bound by the requirements of Fed. R. Civ. P. 52(a) and 53(e) that the court must find the facts specially and state its conclusions of law separately. These findings must be sufficiently complete to facilitate meaningful review by this court. *Kelley v. Everglades Drainage District*, 319 U.S. 415, 422 (1943); *Rucker v. Higher Educational Aids Board*, 699 F.2d 1179, 1183 (7th Cir. 1982). Given the sometimes complex nature of the determinations required of the masters, despite the relatively simple character of the evidence involved, it is particularly useful for the masters to set out which facts they are relying on in reaching their conclusions.

B

Our review of the appeals of the nine individuals is confined to a determination whether the masters' findings are clearly erroneous, *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 927 (7th Cir. 1984) (applying clearly erroneous standard of review to trial court's findings in Title VII case).[4] In certain instances, the masters' failure

[4] In *Nellis v. Brown County*, 722 F.2d 853, 859-60 (7th Cir. 1983), this court subjected the district court's ultimate conclusion as to intentional discrimination in a Title VII case to searching review. We, however, distinguish *Nellis* because we are concerned here with purely factual determinations of causation, the ultimate determination that United's no-marriage rule was illegally discriminatory not being at issue at this time.

to make sufficient findings of the facts on which they relied or to adequately explain their conclusions requires remand. We have considered carefully the nine individual claims presented on this appeal. We address in detail three of these claims below and affirm the district court's disposition of the other six claims.

1. Barbara Thomas Notch, Claim No. 183. Ms. Notch flew for United Airlines from November 1963 to April 1968. She married on May 25, 1968. She was domiciled first in Washington, D.C., then in Los Angeles and, in September 1967, moved to Chicago O'Hare. From September to April, she lived with her parents near Milwaukee and commuted to O'Hare, working three days on, four days off. After her marriage, she lived in Pewaukee, Wisconsin, a small town west of Milwaukee with a similar commute to O'Hare. Upon her marriage she transferred to a ground position with United in Milwaukee but left that job because the hours were poor and she could not control her schedule as she had been able to as a stewardess. She then obtained full-time employment with a local bank. Her husband enjoyed sailing and wanted her to have weekends off in order to sail with him.

The special master, in denying Ms. Notch's claim, referred only to her husband's desire that she have weekends off and to the fact that Ms. Notch did not protest the no-marriage rule and did not apply for unemployment compensation. She, of course, could not apply for unemployment compensation because she was employed virtually continuously after her resignation. Ms. Notch's commitment to the labor force appears obvious and her testimony that her desire to have weekends available could have been satisfied if she had been able to continue as a flight attendant was unrebutted. The fact that Ms. Notch did not lodge a contemporary complaint concerning the rule is, under the circumstances, only minimally probative and does not negate the other facts in the record.

United Airlines apparently failed to present any evidence, even based on cross-examination of Ms. Notch,

which would rebut the claimant's prima facie case and so did not meet its burden of production. The "free weekends" explanation was legally insufficient to rebut the claimant's prima facie case. On appeal, United Airlines has attempted to argue that Ms. Notch would not have been willing to commute from Pewaukee to O'Hare. However, she did commute that distance for approximately eight months, and there is nothing in the record to indicate that she would not have been willing to continue to do so after her marriage. Finally, during the hearing, United and AFA argued that Ms. Notch's inability to recall some of the details concerning her departure from United indicated that she did not resign because of the rule. However, it is not necessary for a claimant to recall all the details of what happened when she resigned, particularly when the established facts of her subsequent work record and other criteria remain unrebutted. In addition, the master did not find Ms. Notch's explanation of her intentions to be incredible. Hence, the master's conclusion appears unsubstantiated by the evidence and our review of the record. We therefore conclude that the master's recommendation is clearly erroneous and reverse the denial of Ms. Notch's claim.

2. Lynne Runyon Overton, Claim No. 677. Ms. Overton flew for United from July 1965 to April 1, 1967. She was married a week after her resignation and moved to Anniston, Alabama for five months while her husband underwent infantry training. Before her resignation, Ms. Overton requested a transfer to a ground job with United in Birmingham, Alabama or Atlanta, Georgia. She also told her supervisor that she believed she must resign because of the no-marriage rule, although she did not protest the rule. In Anniston, Ms. Overton worked full-time for Sears, Roebuck and Company. Following her husband's departure for Vietnam, Ms. Overton returned to Los Angeles and obtained a ground position with United which she has held continuously until the present.

Again, Ms. Overton's commitment to the labor force appears unquestionable and, given the fact that her husband

was overseas, there could be little issue whether her job as a flight attendent would have interfered with her married lifestyle. The only factor upon which the master seems to have relied in denying her claim is that it was uncertain whether Ms. Overton would have been successful in arranging for a personal leave of absence in order to accompany her husband to Alabama. Such leaves were available but were not automatically granted. Ms. Overton also testified that, if she could not obtain a leave, she would have arranged her schedule so as to have a maximum of days off during the five months that her husband was in Alabama.

Ms. Overton introduced evidence at her hearing that it would have been possible, although not certain, that she could have obtained a personal leave. The master, however, seems to have placed on her the burden of proving that she would have obtained the leave. United Airlines presented no evidence concerning its personal leave policy. In response to interrogatories requesting information about the leave policy, United and AFA answered that they had no such information. This question of whether Ms. Overton could have obtained leave appears to be an uncertainty which can never be resolved.

In *Association Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 289 (2nd Cir. 1981), *cert. denied*, 445 U.S. 988 (1982), the nonofferees, like the claimants here, had the burden of proving that they applied to take the qualifying exam or would have but were deterred by the city's discriminatory policy. However, they did not have the burden of proving that they would have met the other requirements, such as physical and medical criteria. Rather, the defendant had the burden of proving that a candidate would not have been otherwise qualified or that there were no vacancies. While it would be difficult for the city to prove the nonofferees' past physical and medical condition based on the general unavailability of such data, the court concluded that the city had created this uncertainty and any such uncertainty should be resolved against it.

The question whether Ms. Overton would have been successful in obtaining a personal leave presents a comparable uncertainty which, because of United's rule, can never be resolved. However, this appears to be an uncertainty which, for legal purposes, should be resolved against the creator of that uncertainty.[5] Further, once the claimant met her burden of establishing a prima facie case, United apparently introduced no evidence, other than the cross-examination of the claimant, in its attempt to rebut the presumption that she would have continued working as a flight attendant. Her commitment to the labor force and her statement to her supervisor stand as unrefuted and seemingly persuasive evidence of her intentions.

The only other factor relied on by the master was his observation of the witness' demeanor during her testimony. This somewhat conclusory statement leaves it unclear whether he simply disbelieved her testimony that she would have continued as a flight attendant or whether he found that she would not have been successful in obtaining the leave. Particularly in view of this statement, we cannot conduct a meaningful review of the master's conclusions and so remand this claim for more complete findings of fact either by the master or by the district court.

3. Marceilla Brown Brown, Claim No. 276. Ms. Brown worked for United Airlines from December 1964 to March 1968 and was married the next month. At the time

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[5] We may contrast the master's apparent assumption in the decision on this claim with the assumption in other claims that women would have been able to obtain satisfactory maternity leaves of absence and thus would have continued their employment as flight attendants despite the birth of children. *See, e.g.*, Claim No. 287 (Vol. 7, # 1272). The resolution of such an uncertainty in the claimant's favor seems to be the correct result in terms of comparable Title VII decisions and general considerations of equity.

of her marriage, she was domiciled in San Francisco, but she and her husband then moved to Kansas where they had both grown up. Ms. Brown testified, however, that they considered moving to Denver, which was a domicile city (that is, a city in which flight attendants were based), and having her conceal her marriage in order to keep flying. She rejected this course, however, for fear that, if discovered, United would fire her thus leaving a black mark on her employment record. She and her husband did move to Denver in 1973 and she applied then for a position as a flight attendant, although apparently as an "after-thought." In Kansas, Ms. Brown obtained full-time employment as a nurse's aid for several months but quit because she found the work depressing and unsatisfactory.

In rejecting Ms. Brown's claim, the master seems to have relied primarily on the Browns' move to Kansas and the impracticability of a commute from Kansas to a domicile city. Ms. Brown, however, never claimed that she would have attempted such a commute. On the other hand, the master does not seem to have considered Ms. Brown's assertion that she would have moved to Denver if she could have stayed on in her flight attendant position or that the Browns did in fact later move to Denver where her husband was able to find satisfactory employment. The master also never made any finding concerning Ms. Brown's claim that she called United to inquire about reinstatement when she learned that the no-marriage rule had been abolished.

While the masters are not required to give detailed findings concerning every factual allegation made by a claimant, it seems that, in this case, the master neither considered nor made findings about the central thesis of the claimant's allegations and, instead, considered and rejected a theory never propounded by the claimant. The denial of this claim must therefore also be remanded for further consideration and additional findings of fact. *See Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1183 (7th Cir. 1982) (district court's decision re-

manded for inadequate findings because judge failed to discuss other evidence presented by plaintiff).

Perhaps running as a thread through the nine specific claims on appeal is the sense that often the masters' conclusions may be insufficiently explained or inadequately supported by the facts in the record. While these cases may be routine to the masters, who are conducting hundreds of these hearings, the masters and the district court must keep in mind that an appellate court may eventually be called upon to review the sufficiency of the findings and their support in the record as well as other questions of law. Even under the "clearly erroneous" standard of review, an appellate court requires adequate findings and an explanation to make its review meaningful.

In addition, it is not enough to reiterate that the burden of proof remains on the claimant throughout the hearing. This is clear from the Order of Reference. The masters must keep equally in mind that United has a distinct burden to introduce evidence rebutting the factual presumption created by the claimant's prima facie case. This means that, if United fails to introduce evidence, the master cannot simply reject the claim unless the master makes a clear credibility determination which negates the claimant's assertion that she would have continued her employment as a stewardess but for the no-marriage rule. Once the claimant establishes a prima facie case and United fails to rebut it by admissible evidence, even under the *Burdine* standard the master's denial of the claim cannot stand. The mere numbers of these hearings should not deter the district court from demanding adherence to the requirements of both sufficiency of findings and an adequate basis in law and fact for the masters' ultimate conclusions.

We therefore affirm in part, reverse in part and vacate and remand in part for further proceedings not inconsistent with this opinion. Each party shall bear its own costs. Circuit Rule 18 shall not apply.

ESCHBACH, *Circuit Judge*, concurring in part and dissenting in part:

I concur in that part of the court's opinion which affirms the district court's allocation of the burdens of proof and production. I write separately only to express my view that, in light of this court's decision not to review the merits of the Order of Reference, any discussion of what we might have done in the first instance, or what we might have considered had we reviewed the Order, is unwise and might serve as the impetus to protract further these already protracted proceedings.

I also concur in the court's resolution of eight of the nine individual claims before us. However, because I cannot find that the Special Master's resolution of the Overton claim is clearly erroneous, I dissent from that part of the opinion which directs that the Overton claim be remanded.

Ms. Overton testified that she delayed marriage until it was almost certain that her fiance, who had enlisted in the service, would be sent to Vietnam. When it became clear that her fiance would see combat, Ms. Overton resigned from her stewardess job, married, and moved to Anniston, Alabama, where she remained with her husband until he was sent overseas five months later. The Special Master found that Ms. Overton and her fiance "decided to get married as soon as possible, decided that Claimant would resign her position . . . and that she would travel to Anniston . . . ," and based on her testimony and demeanor, determined that she had resigned in order to spend the remaining months with her new husband.

At her hearing, Ms. Overton testified that, had there been no discriminatory rule, she would have applied for a leave of absence or traded trips with other stewardesses in order to spend some time with her husband. On cross-examination, Ms. Overton admitted that she did not know what United's policy was with respect to personal leaves, and that she thought they were available for only 90 days. Moreover, she admitted that she had been unable to trade

trips very often during the period before she married. The majority believes that the Special Master unfairly required Ms. Overton to demonstrate that she would have been able to obtain a personal leave had she requested one. I believe, however, that the Special Master viewed Ms. Overton's inability to reconstruct how she could have reconciled both her responsibilities to her job and her desire to spend the remaining few months with her husband as bearing adversely on her credibility. My view is consistent with the Special Master's finding that Ms. Overton and her husband decided that she should resign and move. Unlike the majority, I do not believe that there is any requirement that the Special Masters make express credibility determinations when it is clear that the facts as found by the Master cannot be reconciled with the claimant's testimony about what she would have done absent the rule.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable JAMES B. MORAN

Cause No. 70 C 1157 Date: Sept 9, 1983

Title of Cause: ROMASANTA ET AL VS UNITED AIR LINES, INC. ET AL.

Brief Statement of Motion: Memorandum and Order

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Enter Memorandum and Order. (DRAFT) For those reasons they move for the reversal, or at least rehearing of the adversely decided claims of ten claimants. Without, at this time, specifically ruling on the ten appeals, this court rejects the contentions advanced by plaintiffs. (See DRAFT for particulars)

Moran, *J*

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX McDONALD, on her own behalf and on behalf of all others,
Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

MEMORANDUM AND ORDER

In a consolidated appeal, plaintiffs contend that the special masters are improperly allocating the burden and quantum of proof. They contend that, after a claimant has made a prima facie showing, the employer has the burden of proving by clear and convincing evidence that its adjudicated wrongdoing was not the cause of the termination. They also contend that the special masters have devalued the claimants' testimony and have excessively relied on post-United employment by the adoption of improper evidentiary rules. For those reasons they move for the reversal, or at least rehearing, of the adversely decided claims of ten claimants. Without, at this time, specifically ruling on the ten appeals, this court rejects the contentions advanced by plaintiffs.

This court agrees that a determination made pursuant to an incorrect burden of proof or evidentiary standard must

normally be remanded for a rehearing. I also agree that a reference to *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) is insufficient and perhaps misleading. I believe, however, that plaintiffs' reliance upon "employment decision" and class backpay cases is misplaced.

Once a discriminatory practice has been established, as here, a potential victim of a discriminatory employment decision need only make a prima facie showing of membership in the affected class before the burden of proof shifts to the employer to prove, generally by clear and convincing evidence, that the challenged employment decision was for nondiscriminatory reasons. *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976), so held; that holding was reinforced in *Teamsters v. United States,* 431 U.S. 324 (1977); and *Trout v. Lehman,* 702 F.2d 1094 (D.C. Cir. 1983), *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982), and *Taylor v. Teletype Corp.,* 648 F.2d 1129 (8th Cir. 1981), are their progeny. In each of those cases the plaintiffs, as applicants or persons demoted, were identifiable persons subject to specific employment decisions which had been proved to be tainted by discriminatory practices. The employer in those circumstances must justify its decision if it is to escape liability. If a claimant in this action had been discharged upon marriage United would have that heavy burden here.

It is, of course, conceptually possible for United to prove that a flight attendant who resigned because of the invalid rule would have been terminated anyway because of incompetence, poor attendance or some other legitimate reason for discharge (but with failure to follow grievance procedures a complicating factor). That is, however, a burden which United has not attempted to sustain and, on the basis of this court's experience with this case, it is a burden United is unlikely to shoulder in the future.

The hearings before the special masters, however, involve flight attendants who resigned and who, in almost all cases, did

not initiate grievances or file discrimination charges. The decision to leave was theirs, and the issue before the special masters is whether or not that decision was induced by the no-marriage rule. They are, then, similar to the non-applicants in *Teamsters v. United States, supra,* who "must be given the opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly." *Id.* at p. 364. It is that posture which, this court believes, caused the Court of Appeals to comment in *McDonald v. United Air Lines, Inc.,* 587 F.2d 357, 360 n.4 (7th Cir.), *cert. denied,* 442 U.S. 934 (1979) that claimants "must, as counsel for plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." That same distinction finds expression in *McKenzie v. Sawyer, supra; Association Against Discrimination v. City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981) and *Baxter v. Savannah Sugar Refining Corp.,* 495 F.2d 437 (5th Cir. 1974).

Finally, this court does not believe that class backpay cases, such as *Stewart v. General Motors Corp.,* 542 F.2d 445 (7th Cir. 1976) and *Pittway v. American Cast Iron Pipe Co.,* 681 F.2d 1259 (11th Cir. 1982), are apposite because they relate to the allocation of an established class award. This court has held a class backpay hearing in part because of the highly speculative nature of awards based on attempted reconstruction of what a claimant might have done with her life over the past fifteen years, absent her leaving United upon marriage. How a class backpay award should be divided, in light of that consideration, is a matter for future agreement or decision, but the allocation of an established class award is far different than the issue in the reinstatement hearings.

Plaintiffs also complain that the special masters have adopted evidentiary rules of decisions announced by Special Administrative Master Otis on February 18, 1983. It should perhaps be noted that in their April 7, 1983 reply to AFA

objections to reinstatement rulings contemporaneous to the Summary Memorandum they supported both reliance upon immediate post-termination employment if that occurred (although not the converse) and the master's reliance upon the claimants' testimony. In that same reply they take issue with the AFA's suggestion that the master had ignored and limited his consideration of evidence because he did not directly refer to it in his report, although thereafter in the consolidated appeal a continuing basis for objection is that the master must have relied solely upon those matters to which he directly referred. Finally, United and AFA also question the substance of the February 18, 1983 Summary Memorandum.

First, there is nothing to suggest that the other masters have, in reaching their decisions, felt bound by those comments. Second, this court does not consider those comments to be anything other than reflections based on initial experience. As plaintiffs point out, the reinstatement decisions are largely dependent upon the claimant's credibility. The masters are necessarily relying upon not only what a claimant, after more than 15 years, testifies she thought at the time of her leaving United but also what she testifies she did or said prior to her leaving and for a time thereafter.

The extent to which a claimant actively sought employment and her employment history during some period following termination are both meaningful factors, among others, to be considered by a special master. Although they are not necessarily determinative they may well be the factors which stand out in the special master's mind as those, when considered in light of all the evidence, which most often provided that final evidence that a claimant is or is not a member of the class. That was Master Otis' observation, based upon his initial hearings, and this Court does not consider it to have been any more than that.

It should be kept in mind that each special master has been and will be hearing many claims of substantially similar nature.

They are, in that respect, somewhat akin to administrative law judges or hearing officers whose perceptions are honed and refined by the hearing process itself. It is likely, and not improper, that they will come to rely more heavily on some kinds of evidence than on other kinds. This court, lacking the repetitive hearing experience of the special masters, will be particularly mindful that findings of fact are binding upon it unless clearly erroneous. It intends to, and it will, review carefully all objections to the determinations of special masters and all memoranda filed with respect to objections. It does not intend, however, to spell out it own views with any specificity unless it reverses or questions a determination.

Finally, this court recognizes that the manner and burden of proof is not the same for all the varying circumstances in Title VII cases. It must be tailored to the realities of the case, including how the evidence could or would be presented. See *Teamsters v. United States, supra.* Given the nature of the hearings so far conducted, this court is satisfied that the structure suggested, but not mandated, by *Texas Department of Community Affairs v. Burdine, supra,* should continue to be followed.

JAMES B. MORAN

James B. Moran
United States District Judge

Date: September 9, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable JAMES B. MORAN

Cause No. 70 C 1157 Date: Sept 9, 1983

Title of Cause: ROMASANTA ET AL VS UNITED AIR LINES, INC. ET AL.

Brief Statement of Motion: Memorandum and Order

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Enter Memorandum and Order. (DRAFT) The objections to the Masters reports and recommendations are overruled with respect to the following claimants upon the court's determination that the masters findings are not clearly erroneous: claimants 3, 6, 7, 10, 11, 14, 15, 20, 21, 24 and 25. The court requests the objectors to file with the court the hearing transcripts pertaining to claimant 9, Irene Bene Johnson, and claimant 59, Carolyn Hodges Wheeler. In the latter claim, because a resignation directly coerced by United would significantly reduce the showing required of the claimant, it may be necessary, depending upon the hearing testimony, to seek a specific factual finding from the special master on that issue. The conditional objection to claimant 26, Toby Ryan Mattingly, is overruled as unnecessary; the seniority relief is governed by the July 12, 1982 Order. (See DRAFT for particulars)

Moran, *J*

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX McDONALD, on her own behalf and on behalf of all others,
Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

MEMORANDUM AND ORDER

The objections to the masters' reports and recommendations are overruled with respect to the following claimants upon the court's determination that the masters' findings are not clearly erroneous:

Claimant 3, Sandra Edwards Hernandez
Claimant 6, Elaine Huetten Majchrzak
Claimant 7, Mary Arlene MacAdam Lemley
Claimant 10, Sharon McCoy Bingham
Claimant 11, Drusilla Anderson Engle
Claimant 14, Donna Bothen Canetti
Claimant 15, Charlotte Motsell Cerruti
Claimant 20, Anna Katherine Pugh Smiley
Claimant 21, Barbara Lamb McIntire
Claimant 24, Irene M. Bondurant
Claimant 25, Patricia Powers Hodiak

The court requests the objectors to file with the court the hearing transcripts pertaining to Claimant 9, Irene Benz Johnson, and Claimant 59, Carolyn Hodges Wheeler. In the latter claim, because a resignation directly coerced by United would significantly reduce the showing required of the claimant, it may be necessary, depending upon the hearing testimony, to seek a specific factual finding from the special master on that issue. The conditional objection to Claimant 26, Toby Ryan Mattingly, is overruled as unnecessary; the seniority relief is governed by the July 12, 1982 Order.

JAMES B. MORAN

James B. Moran
United States District Judge

Date: September 9, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable JAMES B. MORAN

Cause No. 70 C 1157 Date: Jan 5, 1984

Title of Cause: ROMASANTA ET AL. VS UNITED AIRLINES, INC. ET AL.

Brief Statement of Motion: Memorandum and Order

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Enter Memorandum and Order. (DRAFT) The class has appealed, in this Second Consolidated Appeal, from adverse determinations by masters respecting five claims. Upon review of the memoranda and masters' reports, this court remands the claim of Janet Meyers Shelton, Claim no. 284, for clarification, and adopts the recommendations of the masters, as not being clearly erroneous, respecting Deanna Dorsey Schulze, Claim no. 547, Linda Williams Andrews, Claim No. 472, Barbara Thomas Notch, Claim No. 183 and Lynne Runnyon Overton, Claim No. 677. (See DRAFT for particulars)

Moran, *J*

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and
LIANE BUIX MCDONALD, etc.,
Plaintiffs,

vs.

UNITED AIRLINES, INC., a corporation
Defendant.

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

MEMORANDUM AND ORDER

The class has appealed, in this Second Consolidated Appeal, from adverse determinations by masters respecting five claims. Upon review of the memoranda and masters' reports, this court remands the claim of Janet Meyers Shelton, Claim No. 284, for clarification, and adopts the recommendations of the masters, as not being clearly erroneous, respecting Deanna Dorsey Schulze, Claim No. 547, Linda Williams Andrews, Claim No. 472, Barbara Thomas Notch, Claim No. 183 and Lynne Runnyon Overton, Claim No. 677.

Much of the argument in these appeals has centered in legal concepts such as "clearly erroneous", "credibility", "mixed questions of law and fact", and "undisputed facts", with plaintiffs contending that a greater deference must be given to the claimant's conclusion that she would have continued to fly when her dscription of the then existing factual context is supportable of that conclusion and that this court

should accord the masters' determinations a rather broad review. This court disagrees.

The claimants left service as flight attendants fifteen or more years ago. The hearings necessarily involve an exploration into what claimants then did, recollections quite possibly affected by time and by present desires. They also involve what claimants otherwise would have done, absent the no-marriage rule, a present reconstruction of what one then would have done even though, the choice not then being present, the claimant may not have then consciously contemplated the alternatives. The masters have been faced with the difficult and uncertain task of determining what would have happened in the past had circumstances been different. While that determination may well not rest upon "credibility" in the narrow sense—a conclusion that someone was lying—it cannot be ignored that claimants are testifying to present subjective beliefs as to what they would have done in the somewhat distant past if they then had had alternatives. Such beliefs are obviously, despite the utmost good faith, subject to the twin distortions of time and self-interest.

A master's determination rests upon whether or not the evidence presented, in its totality, persuades the master that the claimant left because of the no-marriage rule. It requires, in a sense, the master to share in the reconstruction of what might have happened in a woman's life; and what did happen, the ease with which other things could have happened, and the extent to which marriage might have impacted the likelihood that other things would have happened, all play a role. The master is asked to determine what a particular person, who is before him or her as a witness, would have done in other circumstances.

That is an intensely factual exploration; it is not the stuff for determination upon a cold record. Were it otherwise, the concerns plaintiffs have reiterated from time to time, but which this court cannot discern in the reports, might well material-

ize—that determinations would become the results of *per se* rules, a kind of computer-programmed result. As this court has remarked before, the masters in each hearing have the advantage of their experience in other hearings. Their recommendations in Claims Nos. 547, 472, 183 and 677 are amply supported by the record, and they are adopted.

Claim No. 284 stands on a somewhat different footing. The recommendation is clear, but the findings upon which it is based are not. The master leaves ambiguous whether or not he believed that the claimant would have continued to fly for a finite period, absent the no-marriage rule, and that factual conclusion is determinative of the propriety of the recommendation. That claim is, therefore, remanded for the indicated clarification and, if appropriate, reconsideration.

JAMES B. MORAN

JAMES B. MORAN
Judge, United States District Court

January 5, 1984.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable JAMES B. MORAN

Cause No. 70 C 1157 Date: Feb 1, 1984

Title of Cause: ROMASANTA ET AL. VS UNITED AIRLINES, INC. ET AL.

Brief Statement of Motion: AMENDED ORDER

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

The Memorandum and Order dated January 5, 1984 respecting Second Consolidated Appeal is amended as follows: "The Court adopts the recommendation of the masters respecting Marcilla Brown Brown, claim no. 276" all other aspects of the order to stand.

Moran, *J*

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable JAMES B. MORAN

Cause No. 70 C 1157 Date: Oct 27, 1982

Title of Cause: ROMASANTA ET AL. VS UNITED AIR LINES, INC. ET AL.

Brief Statement of Motion: Order of Reference to Special Administrative Master

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Enter Order of Reference to Special Administrative Master. (DRAFT) (See DRAFT for particulars)

Moran, *J*

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MC DONALD, on her own behalf and on behalf of others,

Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,

Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,

Intervenor.

No. 70 C 1157

Judge Moran

ORDER OF REFERENCE TO SPECIAL ADMINISTRATIVE MASTER

I.

Appointment and Powers

1. James T. Otis, a member of the Bar admitted to practice in this Court, is hereby appointed presiding Special Administrative Master ("SAM") to administer and conduct hearings on claims of women asserting they are members of the class in this matter, defined as "all women who were employed by United Air Lines, Inc. as stewardesses, and who resigned or were terminated because of United's no-marriage policy between July 29, 1965 and November 7, 1968 when the no-marriage rule was abolished." The SAM will also oversee other Special Masters in this action as may be appointed by the Court. The Special Masters will hear and report to the Court as to the

validity of the women's claims to be members of the class and as to the relief to be granted.

2. The SAM and other Special Masters will proceed as appropriate pursuant to Rule 53(c) FRCP.

3. For each claimant, a Special Master will prepare a report and recommended decision and, if requested by a party, proposed findings of fact and conclusions of law pursuant to Rule 53(e) FRCP.

II.

Principles

4. Only a claimant who resigned or was terminated as a United flight attendant between July 29, 1965 and November 7, 1968 (the "class period") is eligible to attempt to prove that she is a member of the class. The claimant has the burden of proving that she is a member of the class.

5. When an eligible claimant proves she was married at the time of her designation or termination, or that she married within 90 days after her resignation or termination, those opposing reinstatement will have the burden of going forward with a showing that some reason other than the no-marriage rule led to the end of her employment as a flight attendant.

6. Some indication that an eligible claimant may have resigned or been terminated because of the no-marriage rule are the following:

(a) she concealed her marriage and continued to fly; or

(b) she on marriage sought transfer to ground employment with United; or

(c) she sought other employment before or within 90 days after her termination or resignation; or

(d) she is found by the Special Master to have made contemporaneous protests to her supervisor or United management about her dissatisfaction with the no-marriage rule.

7. Some indication that an eligible claimant may have resigned or been terminated for a reason other than the no-marriage rule are the following:

(a) she gave United a reason inconsistent with the no-marriage rule as the reason for her resignation or termination; or

(b) she failed to apply for a transfer with United, to seek other employment outside the company, or to apply for unemployment compensation at or about the time of her resignation or termination.

8. Any claimant who received notice of the class action in a timely fashion from the Internal Revenue Service, who did not appear through separate counsel and who failed to mail her questionnaire to class counsel on or before June 15, 1980 is not entitled to be a member of the class.

9. Any claimant who did not receive notice of the class action from the Internal Revenue Service and failed to respond by April 1, 1981 to the notice by publication ordered by this Court on January 30, 1981 is not entitled to be a member of the class.

10. Any claimant who pressed her claim and received a final order or settled her claim in this or another forum is presumptively barred and is not entitled to be a member of the class, subject to rebuttal.

11. Any claimant who accepted United's offer of reemployment as a flight attendant and withdrew her grievance or EEOC complaint as a condition of that acceptance is presumptively barred and is not entitled to be a member of the class, subject to rebuttal.

III.

Procedures for Hearings (Other Than the First Ten)

12. Counsel from time to time shall submit to the SAM an agreed-upon list, in order of priority, of the names of those claimants whose claims are to be heard. If counsel are unable to agree on the order of priority in a timely manner it will be set by the SAM. Members of the random sample of claimants who have responded to discovery requests will be heard first.

13. The SAM will send notice of each individual hearing, time and location, to all counsel not later than 90 days before such individual hearings.

14. Not later than 60 days before a hearing, counsel for the claimant whose claim is to be heard will file with the SAM (except the items listed in "b" below) and serve on United and Association of Flight Attendants ("AFA") a statement of her claim which will include: (a) a brief statement of the facts to be aserted in support of the claim and of the specific relief sought by the claimant, (b) a copy of claimant's answers to any Interrogatories and Request for Production of Documents, and (c) a witness list and list of exhibits and, upon request, copies of exhibits.

15. Not later than 40 days before a hearing, counsel for United and counsel for AFA will each file the responsive statement to the claim, if it is to be contested, which will include: (a) a statement of agreed facts which need not be proved at hearing, (b) a statement of contested facts, (c) a statement of any affirmative defense, including supporting facts, (d) notices of depositions, if necessary, (e) a copy of its Answers to Plaintiff's Interrogatories and Request for Production of Documents relating to individual claimants, and (f) a witness list.

16. The SAM shall designate the Special Master for a hearing at least two weeks prior to the hearing date and so advise counsel.

17. Counsel may at any time agree by stipulation, without hearing, that a claimant is or is not entitled to be a class member.

18. Hearings will be recorded similarly to magistrates' hearings. Each party will pay for a reporter's services if requested and his or her own copy of the transcript, if ordered.

19. The Federal Rules of Evidence will apply to the conduct of the hearings. Interlocutory rulings of the Special Master on matters of discovery or evidence may be presented to the Court for review provided, however, that proceedings on a particular claim will not be stayed pending such Court review unless, in the opinion of the Special Master and the SAM, such a ruling may materially advance the subsequent conduct of the hearings.

IV.

Relief

20. Each claimant found by the Special Master to be a member of the class will be recommended for reinstatement, as appropriate, in accordance with the Court's order of July 12, 1982, in conformity with the Memorandum and Order of January 8, 1982 and any modification thereof unless the Special Master finds a compelling equitable reason militating against her reinstatement. Any finding of a compelling equitable reason shall be immediately reviewable by the Court.

V.

Costs

21. The SAM and each Special Master will be compensated in the amount of $100 for each hour spent in hearing

preparation (including review of the records and ruling on preliminary matters), actually hearing each claim and preparing a report and recommended decision on each claim.

22. United will pay the Special Master for time spent as described in paragraph 20, except if written findings of fact and conclusions of law are requested for any claim, in which event the fees for such preparation will be paid by the requesting party, and except if the Special Master shall specify, for stated reasons such as the extent to which a position lacked merit, failure to cooperate in the establishment of largely undisputed facts, the unnecessary prolonging of proceedings or (in the case of AFA) prolonging proceedings to establish points or positions germane to AFA rather than United, that AFA, the claimant, or both, shall pay a portion or all of the costs and fees.

23. Either United or AFA may withdraw opposition to any particular claim, in which event the other party will bear the sole risk of costs thereafter incurred.

24. Bills for services for the SAM and the Special Masters will be tendered by the SAM to the appropriate parties c/o their counsel on a monthly basis. Bills for services will be paid promptly. Objections to any billing will be filed immediately with the Court for resolution.

JAMES B. MORAN
Judge, United States District Court

October , 1982.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,

Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,

Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,

Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL ADMINISTRATIVE MASTER'S SUMMARY MEMORANDUM AND APPENDIX TO REPORTS AND RECOMMENDED DECISIONS ON CLAIM NOS. 1 AND 3-8, INCLUSIVE

Attached to this Summary Memorandum and Appendix are my Reports and Recommended Decisions on the seven claims fully heard by me during the week of January 17-21, 1983, at Chicago, Illinois. The record on the claim of Pamela Laycock Bowles, Claim No. 2, remains open pending advice by counsel. As more fully set forth in the several Reports and Recommended Decisions, I am recommending that the Court order reinstatements of Mary McGuire Bradbury, Claim No. 1; Sandra Edwards Hernandez, Claim No. 3; Nancy Spurlock Kopp, Claim No. 4; Barbara Sauers Zawila, Claim No. 5; Elaine Huetten Majchrzak, Claim No. 6; and Nancy King Summarco, Claim No. 8. I am recommending that Mary Arlene MacAdam Lemley, Claim No. 7, not be reinstated.

I offer the following comments and observations for the benefit of the Court and counsel in evaluating the processing of these claims and in further considering how to handle forthcoming claims.

1. I have attached to this Summary Memorandum an Appendix listing these portions of transcripts and exhibits from other proceedings in this action designated by counsel, rather than attach these designations to each of the several Reports and Recommended Decisions. I reviewed all of this material before attempting to evaluate each of the claims. I found all of the material interesting, if not always relevant and helpful to the very narrow question before me. (See: Transcript of Proceedings before District Judge Moran, 8/27/82.)

2. I question whether individual oral hearings are the best way to resolve most of these kinds of claims. All of the claimants and non-party witnesses were "good witnesses" as that phrase is generally understood by judges and experienced trial lawyers. Given the backgrounds and experiences of the claimants, the high quality of their testimonial demeanors should not be surprising. I think that the extent of the thorough cross-examination on these claims perhaps reflects that common perception by all participating counsel. I suggest that counsel give renewed consideration to more mechanization of the claims process and reducing the need for and scope of oral hearings.

3. On the merits, in general I found the evidence as to what each claimant did, more persuasive than what she said, without questioning the latter. I did not sense any serious credibility problems, other than the kind inherent in changes of perception with the passage of time and altered circumstances. I thought a claimant's demonstrated commitment full-time to the labor market with, or outside of, United at or about the time of resignation was highly persuasive, if not determinative.

I would be pleased to discuss these comments and observations with the Court and counsel after all have had an opportunity to review these first Reports and Recommended Decisions.

JAMES T. OTIS

James T. Otis
Special Administrative Master

Chicago, Illinois
February 18, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,

Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,

Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,

Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL ADMINISTRATIVE MASTER'S REPORT AND RECOMMENDED DECISION CLAIM OF MARY ARLENE LEMLEY, CLAIM NO. 7

Pursuant to the Order of Reference (10/27/82) and the applicable provisions of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Mary Arlene Lemley (hereinafter "Claimant") against Defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of Claimant's Statement of Claim and List of Witnesses and Exhibits, United's Amended Answer to Statement of Claim (12/15/82) and the Responsive Statement of Association of Flight Attendants (hereinafter "AFA") to Statement of Claim of Mary MacAdam Lemley.

Claimant does not allege that she married within 90 days of her resignation but she does allege and United admits that she concealed her marriage and continued to fly. Claimant seeks back pay (including interest and benefits) and reinstatement with restoration of original seniority. United asserts that Claimant failed to protest her termination to United at the time she terminated her employment as a flight attendant; that Claimant failed to apply for a transfer to another position with United when she terminated her employment as a flight attendant; Claimant failed to obtain full-time employment within two years after terminating her employment as a flight attendant; that Claimant never again applied for employment as a flight attendant; and that Claimant failed to apply for unemployment compensation within 90 days after terminating her employment as a flight attendant. United denies the claim. AFA, for want of knowledge, denies material allegations of the claim, alleges a variety of affirmative defenses and reserves additional unspecified defenses.

b. *Witnesses*—Claimant; William A. Lemley, offered by Claimant; and Caroline Genevive Newton, offered by United.

c. *Exhibits*—

Exhibit No.	Item
Lemley Defendant Exhibit 1	Excerpted from article entitled "Jet Age Stewardess," United Airlines Mainliner magazine, p. 3 (January, 1961)
Lemley Defendant Exhibit 2	UAL Retirement Income Plan Non-subscriber Card for M. A. MacAdam

In addition to the foregoing, the parties designated and I reviewed the transcripts of testimonies and documentary exhibits from other court proceedings in this action, all as listed in the Appendix to Summary Memorandum (2/18/83) filed concurrently with this Report.

2. Material Facts

I find the following material facts from the testimonial and documentary evidence adduced at the hearing on this claim on January 20, 1983.

Claimant (then Mary Arlene MacAdam) began working as a United flight attendant in July, 1960. At that time she knew of United's no-marriage rule.

In late 1965 or early 1966 Claimant became engaged to be married to William A. Lemley. Claimant and Mr. Lemley were married on April 2, 1966. Claimant hid her marriage, continued to fly, and then resigned as a United flight attendant on June 16, 1966.

Claimant testified that she felt that by hiding her marriage she was "becoming paranoid" and was "being watched." She testified that she found it difficult to communicate with her co-workers and that she was fearful of being fired if found out. Claimant testified that she would have deferred her marriage if she had known of the prospective abrogation of the no-marriage rule.

There is scant evidence that Claimant seriously sought to remain in the labor force upon her ending her position as a United flight attendant. Except for one attempt some years later (the record does not disclose the precise date, except that it could not have been before November, 1974) when Claimant sought employment with the United States Postal Service at Issaquah, Washington, there is no evidence that she ever sought to reenter the labor force full-time after leaving United.

3. Conclusions of Law

Claimant is not a member of the class.

4. Recommended Decision

I recommend that Claimant Mary Arlene Lemley not be reinstated as a flight attendant with Defendant United Airlines, Inc.

JAMES T. OTIS

James T. Otis
Special Administrative Master

Chicago, Illinois
21 February, 1983
(231/Q)

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and on behalf of all others, *Plaintiff,* *vs.* UNITED AIR LINES, INC., a corporation, *Defendant,* ASSOCIATION OF FLIGHT ATTENDANTS, *Intervenor.*	No. 70 C 1157 Judge Moran

SPECIAL ADMINISTRATIVE MASTER'S REPORT AND RECOMMENDED DECISION CLAIM OF SHARON MC COY BINGHAM, CLAIM NO. 10

Pursuant to the Order of Reference (10/27/82) and the applicable provisions of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Sharon McCoy Bingham (hereinafter "Claimant") against Defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of Claimant's Statement of Claim and List of Witnesses and Exhibits, United's Answer to Statement of Claim and the Responsive Statement of Association of Flight Attendants (hereinafter "AFA") to Statement of Claim of Sharon McCoy Bingham.

Claimant alleges that she married within 90 days of termination. United and AFA plead want of knowledge as to the material allegations and allege various facts in opposition to the claim.

b. *Witnesses*—Claimant, Barbara Oster and Carol Bingham, both called by Claimant.

c. *Exhibits*—

Exhibit No.	Item
Bingham AFA Exhibit 1	Bingham social security earnings record

In addition to the foregoing, the parties designated and I reviewed the transcripts of testimonies and documentary exhibits from other court proceedings in this action, all as listed in the Appendix to the Summary Memorandum (2/18/83) filed February 21, 1983.

2. Material Facts

I find the following material facts from the testimonial and documentary evidence adduced at the hearing on this claim on April 18, 1983.

Claimant (then Sharon Frances McCoy) began working as a United flight attendant in April 1961. She became aware of United's no-marriage rule.

In 1967 Claimant met her husband-to-be, a United pilot. They became engaged in July 1968. Claimant resigned as a flight attendant in October and they married in November, 1968.

In accordance with pre-marital discussions and plans, Claimant and her new husband spent much time in January and February, 1969, looking at properties in the Napa Valley in California, the search culminating in the purchase of an old ranch which they personally rehabilitated and commenced to develop. Together they searched out and selected suitable

architectural plans, undertook the construction of their new home and they did most of the work. Claimant devoted almost full time to the project. In 1970 the structure was sufficiently roughed-in and closed so that they were able to move in and set up house, Claimant's mother also coming to live with them. In 1971 and 1972 they started to develop vineyards on the property and together completed construction of the house in 1974.

Claimant testified she did not wish to contest the no-marriage rule at the time of her resignation lest it put her husband's job in jeopardy. She had previously heard rumors that the union was trying to set aside the rule but she did not pursue the rumors by further inquiry. Claimant never notified the union of any dissatisfaction with the no-marriage rule and she did not file any grievance. Claimant never sought unemployment compensation and has not sought employment since her resignation as a flight attendant.

Witness Oster had been a roommate of Claimant while she was a flight attendant. Witness Oster testified that they frequently discussed the no-marriage rule and that Claimant thought the rule was "unfair." She also testified that during her engagement period Claimant expressed the hope that the rule would be changed.

Claimant's husband also testified that he said they had discussed possible concealment of the marriage but this was unacceptable. Mr. Bingham corroborated Claimant's full-time commitment to building their house. He said he had come from a farm background and had long intended to develop a farm as "a way of life."

3. Conclusions of Law

Claimant was employed by United as a flight attendant and resigned her position as a flight attendant for a reason other than United's no-marriage policy during the class period. Claimant is not a member of the class.

4. Recommended Decision

I recommend that Claimant Sharon McCoy Bingham not be reinstated as a flight attendant with Defendant United Air Lines, Inc.

JAMES T. OTIS

James T. Otis
Special Administrative Master

Chicago, Illinois
6 May, 1983
(378/X)

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served as indicated on each of the following addressees on May 11, 1983.

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JAMES T. OTIS

James T. Otis
Special Administrative Master

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her behalf and on behalf of all others,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant.

No. 70 C 1157

Judge Moran

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION OF CLAIM OF IRENE M. BONDURANT, CLAIM NO. 24

Pursuant to the Order of Reference (10/27/82) and Rule 53 of the Federal Rules of Civil Procedure, for the reasons set forth below, I recommend to the Court that the entitlement claim of IRENE M. BONDURANT (hereinafter "CLAIMANT") against defendant, UNITED AIRLINES, INC. (hereafter "UNITED"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of CLAIMANT's Statement of Claim and List of Witnesses and Exhibits, UNITED's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants (hereafter "AFA") to Statement of Claim.

CLAIMANT alleges that she married within 90 days of termination. CLAIMANT alleges but UNITED denies that she protested to her supervisor or UNITED about her dissatisaction

with the no-marriage rule. CLAIMANT does not allege that she concealed her marriage and continued to fly or that she sought to transfer to a ground position with UNITED or sought other employment outside of UNITED within 90 days of her termination, UNITED denies the claim. AFA also contests the claim.

b. *Witnesses*—CLAIMANT, Jane Wannamaker Becher (called by CLAIMANT), Janet R. Goodall (called by AFA).

c. *Exhibits*

Exhibit No.	Item
Plaintiff Exhibits 1-32	"Orchid Letters" from United to Claimant and In-Flight Observation Reports

In addition to the foregoing, I reviewed the transcripts of proceedings, documents, opinions and other material designated by the parties, as listed in the Appendix to the Summary Memorandum (5/6/83) filed concurrently with this Report.

2. Material Facts

I find the following material facts from the evidence adduced at the hearing on this claim on April 25, 1983.

CLAIMANT (then Irene M. McCausland) began working as a flight attendant in April, 1962. She grew up in Scotland where she graduated from high school and worked in a factory. She emigrated to the United States in 1960. She worked as a file clerk from 1960 until she got her job with UNITED.

CLAIMANT appears to have had an exceptional record at UNITED. Numerous "orchid letters" (letters of commendation from UNITED, often reflecting letters of praise from passengers) were introduced, indicating CLAIMANT was a poised, considerate flight attendant who took her job seriously and probably charmed everyone with her Scottish accent.

CLAIMANT met her husband, from whom she is now divorced, in 1965. They became engaged in November, 1965

and married on April 23, 1966. CLAIMANT resigned her position on March 15, 1966, in anticipation of her upcoming marriage.

After leaving UNITED, CLAIMANT did not again work in a paid position until December, 1982. She lived in Chicago, Illinois. Following her marriage, she did not seek employment. She did become involved in volunteer work with the Junior League, the Women's Board of Presbyterian-St. Luke's Hospital, the Girl Scouts, the North Avenue Day Nursery and "Clipped Wings", an alumni organization for former United flight attendants. In this capacity she worked 2-3 days a week for several years, until the birth of one of her children. Apparently, CLAIMANT's husband, who was a bank officer, encouraged CLAIMANT's charity work.

CLAIMANT did not protest the no-marriage rule at the time she quit her job. She says she told her supervisor she would like to work at UNITED's training school in Chicago, but she did not seek a transfer to any ground position at UNITED. CLAIMANT did not seek unemployment compensation.

CLAIMANT did not think anything could be done about the no-marriage rule and so did not file a union grievance. She thinks she heard the rule had been changed about 1970.

CLAIMANT says she would have continued flying but for the no-marriage rule, at least until she had her first child. Her counsel also argues that she was not trained for any other work and that it was unrealistic to expect her to attempt to find anything else. CLAIMANT, however, had done some paid public relations work for Continental Baking Company while employed by UNITED.

Janet R. Goodall, a current flight attendant, testified for the AFA. She said she flew with CLAIMANT her last month of employment and that when she suggested CLAIMANT attempt to conceal her marriage, CLAIMANT said she had

worked long enough and wanted to quit "and stay home and eat bon-bons."

I have given Ms. Goodall's testimony little consideration in reaching a decision on this claim. The conversation Ms. Goodall allegedly remembered occurred 17 years ago and it seems unlikely it would have seemed important enough to remember at the time. She could not remember anyone else among the crew of the airplane on which she says she and CLAIMANT were fiying, or other details apart from the conversation stated. CLAIMANT denied ever having met Ms. Goodall, let alone having the conversation described.

Even discounting Ms. Goodall's testimony, the evidence indicates CLAIMANT did not intend to continue working after her marriage. There is evidence that her husband wanted her to do charity work and entertain. She did not protest the rule at the time. She did not apply for a single position with any potential employer. Perhaps she could not have found any other acceptable employment, but it seems more likely that if she was interested in continuing a career she would have made an attempt to see if some position of interest was available.

3. Conclusions of Law

CLAIMANT is not a member of the class.

4. Recommended Decision

I recommend that Claimant, IRENE M. BONDURANT not be reinstated as a flight attendant with defendant, UNITED AIRLINES, INC.

ELAINE E. BUCKLO

Elaine E. Bucklo
Special Master

Chicago, Illinois
May 6, 1983

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and on behalf of all others, *Plaintiff*	No. 70 C 1157
vs.	Judge Moran
UNITED AIR LINES, INC., a corporation, *Defendant*	

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION OF CLAIM OF PATRICIA ELLEN HODIAK, CLAIM NO. 25

Pursuant to the Order of Reference (10/27/82) and Rule 53 of the Federal Rules of Civil Procedure, for the reasons set forth below, I recommend to the Court that the entitlement claim of PATRICIA ELLEN HODIAK (hereafter "CLAIMANT") against defendant UNITED AIR LINES, INC. (hereafter "UNITED"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of CLAIMANT'S Statement of Claim and List of Witnesses and Exhibits, UNITED's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants (hereinafter "AFA") to Statement of Claim.

CLAIMANT alleges that she married within 90 days of her resignation. CLAIMANT seeks back pay (including

interest and benefits) and reinstatement with restoration of original seniority. UNITED denies the claim. AFA also opposes the claim.

b. *Witness*—CLAIMANT.

c. *Exhibits*—

Exhibit No.	Item
Claimant's Exhibit 1	"Orchid Letter"

In addition to the foregoing, the parties designated and I reviewed the transcripts of proceedings, documents, opinions and other material designated by the parties, as listed in the Appendix to the Summary Memorandum (5/6/83) filed concurrently with this Report.

2. Material Facts

I find the following material facts from the evidence adduced at the hearing on this claim on April 25, 1983.

CLAIMANT became a United Flight attendant in May, 1962. Prior to this time she attended three semesters of college.

CLAIMANT testified she loved her job. She liked the passes she got (on which she usually went home) and the reduced fare trips she was able to take to Europe. She liked feeling "special" when she went home to the small town she grew up in. She liked the public contact and personal attention she could give her passengers. She like the flexible hours her job gave her.

CLAIMANT met her husband in 1963. She began dating him in 1964 and they became engaged in 1965. They were married on January 29, 1966. She resigned her position as of January 22, 1966. She did not consider attempting to conceal her marriage because she felt it would be wrong to violate a rule.

From the time CLAIMANT left UNITED until the summer of 1982, when she worked for approximately 96 hours, as a

"shopper" for another airline, CLAIMANT has had no paid employment except for a few days as a demonstrator at conventions sometime during the 1970's. CLAIMANT says she did not seek another position at UNITED when she got married because she did not want any other position. She says she did not seek any other employment because she did not have skills and because it would be a tax disadvantage for her to work.

At the time CLAIMANT left UNITED, she did not protest the no-marriage rule. She does not recall discussing the rule with her fiance other than that they agreed she would follow the rule. She did not apply for unemployment compensation.

CLAIMANT's child was born in October, 1967.

CLAIMANT says she would have continued flying, but for the no-marriage rule. The evidence does not indicate any reason why she could not have easily continued flying but for the rule. According to her testimony, however, she made no protest at all about the rule, not even to her supervisor or fiance. She lived in Los Angeles.

She had some college as well as her public relations skills developed as a flight attendant, and lived in an area where it would be expected that a variety of jobs might be available, including at least the possibility of some interesting positions. Yet she never attempted to find any other employment. In addition, CLAIMANT testified that, taxwise, it would not have made sense for her to work. Under all these circumstances, I conclude that CLAIMANT would probably have quit work even if the no-marriage rule had not been in effect.

3. Conclusions of Law

CLAIMANT is not a member of the class.

4. Recommended Decision

I recommend that CLAIMANT, PATRICIA ELLEN HODIAK not be reinstated as a flight attendant with defendant, UNITED AIR LINES, INC.

PATRICIA ELLEN HODIAK,

BY: ELAINE E. BUCKLO
ELAINE E. BUCKLO
Special Master

Chicago, Illinois
May 6, 1983

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her behalf and on behalf of all others, *Plaintiffs,*	No. 70 C 1157
vs.	Judge Moran
UNITED AIR LINES, INC., a corporation, *Defendant.*	

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION OF CLAIM OF BARBARA THOMAS NOTCH, CLAIM NO. 183

Pursuant to the Order of Reference (10/27/82) and Rule 53 of the Federal Rules of Civil Procedure, for the reasons set forth below, I recommend to the Court that the entitlement claim of BARBARA THOMAS NOTCH (hereafter "CLAIMANT") against defendant, UNITED AIR LINES, INC. (hereafter "UNITED"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of CLAIMANT's Statement of Claim and List of Witnesses and Exhibits, UNITED's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants (hereafter "AFA") to Statement of Claim.

CLAIMANT alleges that she married within 90 days of her resignation and that on marriage she sought to transfer to a ground position with UNITED. CLAIMANT seeks back pay

(including interest and benefits) and reinstatement with restoration of original seniority. UNITED denies the claim. AFA also contests the claim.

b. *Witnesses*—CLAIMANT

c. Exhibits

No.	Item
AFA Notch Ex. 1	Chart VI, Answers to Interrogatories

I reviewed the transcripts of proceedings, documents, opinions and other material designated by the parties, as listed in the Appendix to the Summary Memorandum (7/1/83) filed concurrently with this Report.

2. Material Facts

CLAIMANT began flying for UNITED in November, 1963. She was domiciled first in Washington, D.C., and then in Los Angeles. CLAIMANT transferred to Chicago O'Hare in September, 1967.

CLAIMANT met her husband in the summer of 1967. They became engaged that fall and CLAIMANT applied for transfer to a ground job in Milwaukee. She did obtain a position as a ticket counter agent in downtown Milwaukee in June, 1968. CLAIMANT did not like the hours because she could not control the days she had off and left the job after about six weeks. She obtained another job, with a local bank, after that.

After CLAIMANT transferred from Los Angeles to O'Hare, she lived at home with her parents in an area near Milwaukee. She drove to and from O'Hare, working a three day on, four day off schedule. CLAIMANT's husband lived in Pewaukee, Wisconsin, a small town west of Milwaukee. Pewaukee is between a 1½ and 2 hour drive from O'Hare. CLAIMANT's husband was a livestock broker. He also sailed, which was the reason CLAIMANT wanted weekends off.

CLAIMANT left her flight attendant position in April, 1968. She married on May 25, 1968. CLAIMANT did not protest the no-marriage rule with UNITED or with the union. She did not file for unemployment compensation. After listening to CLAIMANT's testimony and considering the evidence, I conclude that CLAIMANT would probably have left her position as a flight attendant in April, 1968 even if the no-marriage rule did not exist.

3. Conclusions of Law

CLAIMANT was employed by UNITED as a flight attendant and resigned her position as a flight attendant for a reason other than UNITED's no-marriage policy. CLAIMANT is not a member of the class.

4. Recommended Decision

I recommend that CLAIMANT, BARBARA THOMAS NOTCH, not be reinstated as a flight attendant with defendant, UNITED AIR LINES, INC.

ELAINE E. BUCKLO

ELAINE E. BUCKLO
Special Master

Chicago, Illinois
July 1, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and
LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,
Plaintiff,

vs.

UNITED AIR LINES, INC. a corporation,
Defendant

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION CLAIM OF MARCEILLA BROWN BROWN, CLAIM NO. 276

Pursuant to the Order of Reference (10/27/82) and the applicable provisions of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Marceilla Brown Brown (hereinafter "Claimant") against defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of Claimant's Statement of Claim And List of Witnesses and Exhibits, United's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants [hereinafter "AFA"] To Statement of Claim. Claimant alleges that she was married within 90 days of her termination from

United (United and AFA deny knowledge or information sufficient to form a belief as to the truth of that allegation); Claimant further alleges that she sought other employment before or within 90 days after her termination from United; United denies and AFA contests that further allegation. Claimant seeks back pay (including interest and benefits) and reinstatement with restoration of original seniority. United asserts: that Claimant failed to protest her termination at the time she terminated her employment; that Claimant failed to apply for a transfer to another position with United when she terminated her employment as a flight attendant; that Claimant failed to apply for unemployment compensation within 90 days after terminating her employment; that Claimant changed her residence upon marriage or within one year after marriage to a location from which it would have been difficult if not impossible to remain as a United flight attendant; and that Claimant left the labor force within a finite period following termination from United. AFA asserts: that Claimant failed to protest her termination to United at the time she terminated her employment with them; that Claimant failed to apply for a transfer to another position with United when she terminated her employment as a flight attendant; that Claimant failed to apply for unemployment compensation at or about the time of her termination; that Claimant changed her residence upon marriage or within a finite period after marriage to a location from which it would have been difficult if not impossible to remain as a United flight attendant; and that Claimant left the labor force within a finite period following termination.

b. *Witnesses*—Claimant.

c. *Exhibits—*

Exhibit No.	Item
Brown Plaintiff Group Exhibit 1	Various Orchid letters
Brown Plaintiff Group Exhibit 2	Various Stewardess In-Flight Observation Reports
Brown Plaintiff Group Exhibit 3	Three Letters Re Volunteer Work for Red Cross
AFA Brown Exhibit 1	Notice of Employee Status
AFA Brown Exhibit 2	1968 W-2 Form For St. Anthony Hospital

In addition to the foregoing, the parties designated, and I reviewed various materials contained in the Orientation Kit described in the Appendix to my Summary Memorandum dated May 24, 1983, and served by James T. Otis, Special Administrative Master on May 27, 1983.

d. *Attorneys:* Claimant was represented by Kaarina Salovaara, United was represented by Steven Goldberg, and AFA was represented by Peter Herman.

2. Material Facts:

Considering the testimony and documentary evidence adduced at the hearing on June 27, 1983, and the various documents (listed in the Appendix attached to the May 24, 1983 Summary Memorandum) designated by the parties, I find the following material facts:

Claimant (then Marceilla Faye Brown) began working as a stewardess for United on December 9, 1964. She resigned on March 28, 1968, and became married on April 22, 1968.

Claimant was aware of the "No-Marriage Rule" [hereinafter "Rule"] when she became a stewardess.

At the time of her marriage, Claimant was domiciled in San Francisco, California. Her husband and she had grown up in a small town in Kansas. When they became married, they

moved to Dodge City, Kansas, from which commuting to a United domicile would have been difficult; no evidence was given that indicates that such a commute would have been endured.

Claimant did not apply for another position with United when she resigned. In 1973, she did apply to them, but that was apparently an after-thought when she accompanied a young friend who wanted to apply to United; Claimant had not even informed her husband that she would be making the application and did not list that application on her Interrogatory Answers.

Claimant claims to have worked full-time for about seven months as a Nurses'* Aid shortly after leaving United; however, her W-2 indicates that only $785.06 was earned at St. Anthony Hospital.

Claimant never applied to another airlines.

She apparently did not complain about having to resign because of United's Rule.

Claimant resigned from United simply because she had decided to quit and move to a small town with her husband.

3. Conclusions of Law

Claimant was employed by United as a flight attendant and resigned for reasons other than United's Rule. Claimant is not a member of the class.

4. Recommended Decision

I recommend that Claimant Marceilla Brown Brown not be reinstated as a flight attendant with Defendant United Air Lines, Inc.

BRUCE A. LEVIN

Bruce A. Levin
Special Master

Chicago, Illinois
July 9, 1983

AFFIDAVIT OF SERVICE

I certify that I caused a copy of the foregoing document to be served as indicated on each of the following addresses on August 3, 1983.

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James T. Otis
Special Administrative Master

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and
LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,
Plaintiff,

vs.

UNITED AIR LINES, INC. a corporation,
Defendant

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION CLAIM OF LINDA WILLIAMS ANDREWS, CLAIM NO. 472

Pursuant to the Order of Reference (10/27/82) and the applicable provisions of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Linda Williams Andrews (hereinafter "Claimant") against defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings*—The pleadings consist of Claimant's Statement of Claim And List of Witnesses and Exhibits, United's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants [hereinafter "AFA"] To Statement of Claim. Claimant alleges

that she was married within 90 days of her termination from United (United and AFA deny knowledge or information sufficient to form a belief as to the truth of that allegation); Claimant further alleges that: upon marriage, she sought transfer to ground employment with United; and she made contemporaneous protest to her supervisor or United management about her dissatisfaction with the No-Marriage Rule (hereinafter "Rule"); United denies and AFA contests both further allegations. Claimant seeks back pay (including interest and benefits) and reinstatement with restoration of original seniority. United asserts: that Claimant failed to protest her termination at the time she terminated her employment; that Claimant failed to seek other employment outside the company at or about the time of her termination; that Claimant failed to apply for unemployment compensation at or about the time of her resignation; and that Claimant never again applied for employment as a flight attendant. AFA asserts: that Claimant failed to seek other employment outside the company at or about the time of her termination; that Claimant failed to apply for unemployment compensation at or about the time of her termination; that Claimant failed to obtain full-time employment within a finite period following termination; that Claimant never again applied for employment as a flight attendant; and that Claimant left the labor force within a finite period following termination.

b. *Witnesses*—Claimant.

c. *Exhibits*—None.

The parties designated, and I reviewed various materials contained in the Orientation Kit described in the Appendix to my Summary Memorandum dated May 24, 1983, and served by James T. Otis, Special Administrative Master on May 27, 1983.

d. *Attorneys:* Claimant was represented by Raymond T. Reott, United was represented by Mary A. Martin, and AFA was represented by Mark Bigelow.

2. Material Facts:

Considering evidence adduced at the hearing on August 4, 1983, and various documents (those listed in the Appendix attached to my May 24, 1983 Summary Memorandum, and those designated in my subsequent Summary Memoranda filed along with my decisions rendered after that date) designated by the parties, I find the following material facts:

Claimant (then Linda Williams) began working as a stewardess for United on September 15, 1965. She resigned on December 15, 1967 and became married on March 2, 1968.

Claimant was aware of the Rule when she worked for United.

Claimant was first domiciled in Chicago and then transferred to Los Angeles; Claimant's first choice would have been Los Angeles in order to be near her family and boyfriend in San Diego (where United did not have a domicile) but Los Angeles was not available because of her lack of seniority. Therefore, she began in Chicago and transferred after six months in order to achieve her original plan.

She started dating her future husband, William Andrews, in 1963 and was dating him exclusively when she became a flight attendant. She became engaged in November, 1967. They married in March, 1968. Claimant's fiance and Claimant's family lived in San Diego, and she spent 75% of her time off there. She says she left, earlier than her marriage would have required, because of family pressure; her brother was leaving for Viet Nam, and her family wanted everyone together for Christmas. She does not recall how she had bid her December schedule. Her explanation is not persuasive—if Claimant was close to her family, knew her brother was going to Viet Nam, and spent 75% of her time off in San Diego, then she should have bid a convenient schedule (assuming her seniority was good when she left, as she claimed it was) if that was a compelling desire. Even if she neglected to do so, or was

unable to, it seems that she would recall that fact if it was so much a factor in her leaving her job earlier than necessary (that assumes the job meant as much to her as she insists).

Claimant maintains that if no Rule existed she would have lived in San Diego and commuted to Los Angeles. A flight took less than one-half hour and cost $6.35 one way. She claims that she would have had to make only two trips per week. She argues that spending so much of her time off in San Diego proves that she would have made the commute. It proves the opposite; spending so much of her time off in San Diego does establish her desire to be there, as does her transfer from Chicago to Los Angeles to be near her boyfriend and family; however, living in Los Angeles for more than one and a half years despite such strong ties to San Diego establishes that she would not commute from San Diego. She did not do so even though she spent the vast bulk of her time in San Diego when she could; obviously, she found it necessary or extremely desirable to live in Los Angeles when working there for United.

When resigning, she asked about ground employment in San Diego but was informed that no jobs were available. About five and a half months after leaving United, she obtained a full-time job at a restaurant. It was advertised as a secretarial/receptionist job, but did not meet that description, and she quit after about five months.

She obtained employment again in January, 1969, as manager for a mailorder sportswear company. That was not full-time employment, but she did work almost every day; the hours varied. She left that job at the end of 1972 when the business closed.

Claimant learned, early in 1969, that United had abrogated its Rule. She did not inquire into her eligibility and did not apply for reinstatement or for becoming a new hire.

In 1976, Claimant became divorced and then applied to United for a flight attendant position; she was not hired.

Claimant did not seek unemployment compensation after leaving United and did not file a grievance with the union (however, she was not a member) or protest to the EEOC or any governmental agency.

Claimant was a United flight attendant for about two years and three months. When she began with United, she was dating her future husband. That relationship was serious, and she transferred domiciles from Chicago to Los Angeles in order to be nearer to him and her family. She continued to live in Los Angeles while a flight attendant, despite the fact that she spent 75% of her time off in San Diego. When she moved to San Diego upon marriage, she would not have commuted to Los Angeles even if possible to continue with United. When Claimant learned about the abrogation of United's Rule, she did not contact United about reinstatement or rehiring. In 1976, she did apply to United to become a flight attendant, but that was only after she had become divorced. Claimant resigned for reasons other than United's Rule.

3. Conclusions of Law

Claimant was employed by United as a flight attendant and resigned for reasons other than United's Rule. Claimant is not a member of the class.

4. Recommended Decision

I recommend that Claimant Linda Williams Andrews not be reinstated as a flight attendant with Defendant United Air Lines, Inc.

BRUCE A. LEVIN

Bruce A. Levin
Special Master

Chicago, Illinois
September 20, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,

Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,

Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,

Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION; CLAIM OF DEANNA DORSEY SCHULZE, CLAIM NO. 547

Pursuant to the Order of Reference (10/27/82) and the applicable rules of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Deanna Dorsey Schulze (hereinafter "Claimant") against defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings.* The pleadings consist of Claimant's Statement of Claim and List of Witnesses and Exhibits, United's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants (hereinafter "AFA") to Statement of Claim. Claimant contends she worked as a United flight attendant from October 31, 1963 until late October 1965, and that she married on April 16,

1966. She further contends, and United and AFA deny, that upon marriage she sought transfer to a United ground job, and sought other employment within 90 days after termination. Claimant seeks back pay (including interest and benefits) and reinstatement with restoration of original seniority. United asserts in opposition to the claim that Claimant failed contemporaneously to protest her termination, failed to seek other employment outside United after termination, and failed to apply for unemployment compensation; that she changed her residence upon marriage to a location from which it would have been difficult or impossible to remain a United flight attendant; that Claimant never again applied for employment as a flight attendant; and that Claimant left the labor force within a finite period after termination. AFA asserts essentially the same facts as United in opposition to the claim.

b. *Witnesses.* Claimant; and Cyril H. Schulze, Claimant's husband.

c. *Exhibits.* None.

d. *Other Materials.* In addition to the foregoing, the parties designated and I reviewed the transcripts of testimony and documentary exhibits from other court proceedings in this action, all as listed in the Appendix to the Summary Memorandum (9/2/83) filed concurrently with this report.

2. Material Facts

I find the following material facts from the testimonial and documentary evidence adduced at the hearing on this claim on August 12, 1983.

Claimant (then Deanna M. Dorsey) worked as a United flight attendant from October 31, 1963 to October 31, 1965. Claimant met Cyril H. Schulze in March of 1965 while he was employed as a senior field engineer for the Federal Aviation Administration based in New York City. Claimant dated Mr. Schulze casually (3-4 times) during the summer of 1965. They decided to marry in late August or early September of 1965, and became formally engaged in December of 1965. When

Claimant and Mr. Schulze discussed their marriage plans, they did not discuss Claimant's career plans, because, as she testified, she did not project any such plans at that time.

In September of 1965, after Claimant had decided to marry, she asked her supervisor to find out about the possibility of a ground job in Cleveland, Ohio. Cleveland was not then a domicile for United flight attendants, but it was to be the next place her husband was to be assigned in his FAA job. Following her inquiry, Claimant obtained a ground job with United in Cleveland.

Based on my observation of Claimant during her testimony, I find that she resigned her job as a United flight attendant in order to be able to live with her future husband in Cleveland, the new site of his employment, and not because of United's no marriage rule. I find that Claimant was committed to her impending marriage, and that this, along with relocation to the Cleveland area which it required, was the reason for her resignation as a flight attendant.

3. Conclusions of Law

Based on the foregoing findings of fact and the applicable legal principles as set forth in the Order of Reference and elsewhere, I reach the following conclusions of law.

Claimant resigned as a United flight attendant for reasons other than the no marriage rule, and is not a member of the class.

4. Recommended Decision

I recommend that Claimant Deanna Dorsey Schulze not be reinstated as a flight attendant with defendant United Air Lines.

JOSEPH R. LUNDY

Joseph R. Lundy
Special Master

Chicago, Illinois
September 2, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CAROLE ANDERSON ROMASANTA, et al., and
LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,
Plaintiff,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant,

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor.

No. 70 C 1157

Judge Moran

SPECIAL MASTER'S REPORT AND RECOMMENDED DECISION; CLAIM OF LYNNE RUNYON OVERTON, CLAIM NO. 677

Pursuant to the Order of Reference (10/27/82) and the applicable rules of the Federal Rules of Civil Procedure, for the reasons more fully set forth below, I recommend to the Court that the entitlement claim of Lynne Runyon Overton (hereinafter "Claimant") against defendant United Air Lines, Inc. (hereinafter "United"), be denied.

1. The Record

a. *Summary of Pleadings.* The pleadings consist of Claimant's Statement of Claim and List of Witnesses and Exhibits, United's Answer to Statement of Claim, and the Responsive Statement of Association of Flight Attendants (hereinafter "AFA") to Statement of Claim. Claimant con-

tends she worked as a United flight attendant from July 28, 1965 until April 1, 1967, and was married on April 8, 1967. Claimant further contends, and United and AFA deny, that on marriage she sought transfer to a United ground job, and sought other employment within 90 days after termination. Claimant seeks back pay (including interest and benefits) and reinstatement with restoration of original seniority. United and AFA assert in opposition to the claim that Claimant failed contemporaneously to protest her termination; failed to apply for unemployment compensation following termination; changed her residence upon marriage to a location from which it would have been difficult or impossible to remain a United flight attendant; never again applied for employment as a flight attendant; and left the labor force within a finite period after termination.

b. *Witnesses.* Claimant

c. *Exhibits.*

Exhibit No.	Description
Overton Plaintiff's Exhibit No. 1	Excerpts of 1967-69 Agreement between United and ALPA relating to leaves of absence

d. *Other Materials.* In addition to the foregoing, the parties designated and I reviewed the transcripts of testimony and documentary exhibits from other court proceedings in this action, all as listed in the Appendix to the Summary Memorandum (10/7/83) filed concurrently with this report.

2. Material Facts

I find the following material facts from the testimonial and documentary evidence adduced at the hearing on this claim on September 30, 1983.

Claimant (then Lynne P. Runyon) began flying with United in July of 1965 and left that job on April 1, 1967.

Claimant was first domiciled in Detroit, and transferred to Los Angeles in May of 1966.

Claimant met Peter Wood in 1963 while she was a student in high school and he was attending Pasadena City College. They began to date exclusively and became engaged in May of 1966, when Claimant changed her United domicile from Detroit to Los Angeles.

In May of 1966 when they became engaged, Claimant and Mr. Wood did not set a date to be married because Mr. Wood had just graduated from college and knew that he would soon be drafted or would have to enlist in the armed forces. In August of 1966, after having been told that he would be assigned to a position in finance and would not be stationed overseas, Mr. Wood enlisted in the U.S. Army.

In February of 1967 Mr. Wood learned that he would not be assigned to a finance unit, but would be assigned to the infantry. This assignment made it clear to Mr. Wood, and he communicated to Claimant, that after completing infantry training he would almost certainly see combat duty in South Vietnam. Upon learning this information, Claimant and Mr. Wood decided to get married as soon as possible, decided that Claimant would resign her position as a United flight attendant, and that she would travel to Anniston, Alabama where Mr. Wood would be undergoing infantry training.

Immediately after making these decisions, Claimant visited her supervisor, Marge Lenz and submitted an oral and written resignation. Claimant also submitted a request for transfer to a ground job in either Birmingham, Alabama or Atlanta, Georgia, the closest cities to Anniston, Alabama which were served by United. At the interview with her supervisor, Claimant did not protest the no marriage rule, but did state that she believed she must resign because of the rule. Claimant's last flight with United was on April 1, 1967, and she was married to Mr. Wood on April 8, 1967. Within one week of her

marriage, Claimant moved to Anniston, Alabama with Mr. Wood, and stayed for five months while he completed infantry training and until he left for Viet Nam. While in Anniston, Claimant sought employment and was hired for a customer service job by Sears, Roebuck & Company in June of 1967.

Upon Mr. Wood's departure for View Nam, Claimant returned to the Los Angeles area and sought a United ground job. After approximately 8-9 months of waiting to hear from United, Claimant was finally hired for a United ground job in May of 1968.

Claimant testified that if United had not had a no marriage rule in February of 1967, she would not have resigned, but would have applied for a personal leave of absence in order to accompany Mr. Wood to Anniston. Claimant admitted, however, that she had never seen the portion of the employment agreement between United and the Air Line Pilots Association governing leaves of absence, that she knew such leaves were not granted automatically, that she did not know personally any flight attendants who had ever obtained a leave of absence from United, and that she had never heard of any leave of absence ever being granted so that a flight attendant could accompany a relative who was serving in the armed forces. Claimant also understood that leaves of absence were granted initially only for 90 days, although she knew that her husband's assignment would keep him in the Anniston area for five months.

Claimant further testified that if a leave of absence had been denied by United in February of 1967, she would have accumulated days off and "trip traded" so that she could travel to Anniston using United passes and reduced fares on other carriers while she continued working as a flight attendant.

Based on the foregoing facts and my observation of the witness' demeanor during her testimony, I find that the reason Claimant resigned her position as a United flight attendant was to accompany her husband to Anniston, Alabama and be with

him during the last few months before he left for combat duty in Viet Nam. I further find, therefore, that the reason for Claimant's resignation was not United's no marriage rule.

3. Conclusions of Law

Based on the foregoing findings of fact and the applicable legal principles as set forth in the Order of Reference and elsewhere, I reach the following conclusions of law.

Claimant resigned her job as a United flight attendant for reasons other than United's no marriage rule. Claimant is not a member of the class.

4. Recommended Decision

I recommend that Claimant Lynne Runyon Overton not be reinstated as a flight attendant with defendant United Air Lines.

JOSEPH R. LUNDY

Joseph R. Lundy
Special Master

Chicago, Illinois
October 7, 1983

Opinion by Judge Cudahy
Judge Eschbach concurring in part and dissenting in part

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 28, 1984.

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. GEORGE CLIFTON EDWARDS, JR., *Circuit Judge**
HON. JESSE E. ESCHBACH, *Circuit Judge*

NOS. 83-3013, 84-1237

LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,
Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., a corporation,
Defendant-Appellee,

v.

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 70 C 1157

JAMES B. MORAN,
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, AND VACATED AN REMANDED IN PART, with each party to bear its own costs on appeal, in accordance with the opinion of this Court filed this date.

---

* Honorable George Clifton Edwards, Jr., Judge, U. S. Court of Appeals for the Sixth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 5, 1984

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. GEORGE CLIFTON EDWARDS, JR., *Circuit Judge**

HON. JESSE E. ESCHBACH, *Circuit Judge*

LIANE BUIX MCDONALD, on her own behalf and on behalf of all others,
Plaintiff-Appellant,

Nos. 83-3013 and 84-1237 *vs.*

UNITED AIR LINES, INC., a corporation
Defendant-Appellee,

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 70 C 1157

JAMES B. MORAN,
Judge

ORDER

This matter comes before this court for its consideration of the following documents:

(1) The "PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL" filed herein on October 12, 1984;

(2) The "PETITION FOR REHEARING" filed herein by Plaintiff-Appellant on October 12, 1984;

(3) The "OPPOSITION OF INTERVENOR-APPELLEE, ASSOCIATION OF FLIGHT ATTENDANTS TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL" filed herein on October 17, 1984.

The court has considered the "PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL" and it is hereby GRANTED.

On consideration of the "PETITION FOR REHEARING" filed by the Plaintiff-Appellant, Liane Buix McDonald, all of the judges on the panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable George Clifton Edwards, Jr. of the Sixth Circuit, sitting by designation.

Office - Supreme Court, U.S
FILED
APR 10 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.,
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the allocation of the burden of proof in petitioners' individual entitlement hearings—during which United Air Lines, Inc.'s liability to petitioners was determined—as applied by Special Masters under the district court's Order of Reference.

2. Whether the court of appeals properly refused to review the general statement of the burden of proof allocation in the Order of Reference, as distinguished from the application of that allocation in the actual hearings which were appealed, where petitioners waited for nearly 9 months and until hundreds of entitlement hearings had been held before raising an objection to the Order of Reference in general.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.,[1]
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Petitioners misstate both the nature of the class entitlement hearings in this unique Title VII case and the holdings of the Seventh Circuit challenged in this petition. Therefore, Respondent United Air Lines, Inc. ("United") restates the pertinent facts.[2]

[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL, Inc. with offices at 1200 Algonquin Road, Elk Grove Village, Illinois 60007.

[2] "App." cites to portions of the Appendix to Petition.

The "long and tortuous" (App. 1a) history of this litigation began in 1968 with an individual suit alleging United's "no-marriage" rule was violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In 1971, the no-marriage rule, which United had eliminated in 1968, was held to have been illegal.[3] *Id.* Only after class action status was denied and the claims of all individual plaintiffs were fully settled (R. 127),[4] did Liane McDonald, a putative class member, intervene. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977). Subsequently, a class was certified to include only those stewardesses who resigned or terminated because of the no-marriage rule. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 359 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

In 1978, the Seventh Circuit held that although claimants who failed to protest their resignations from United were not foreclosed automatically from class membership, they faced a more difficult burden of demonstrating entitlement than claimants who had protested by filing EEOC charges or grievances:

> The stewardesses who resigned must, as counsel for the plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief. Although it may be significantly easier for those who protested to make such a showing, we reiterate our *Romasanta* ruling that the fact that she did not protest will not foreclose a class member from making such a showing.

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[3] The EEOC had puzzled for some time over whether the no-marriage rule constituted sex discrimination. When the EEOC finally deemed the rule unlawful (and before any court had so held), the policy was immediately thereafter (in 1968) abandoned by all airlines including United. Of all the airlines which had the rule, only United has been subjected to the massive liability of this class suit — on reasoning that was trenchantly critized by Judge (now Justice) Stevens in dissent and which has been expressly disapproved by other courts. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1202-1207 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 894 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977).

[4] "R" cites to portions of the record on appeal.

McDonald v. United Air Lines, Inc., 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

On remand, the Association of Flight Attendants ("AFA") was permitted to intervene to represent incumbent flight attendants (*Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1143 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 1928 (1984)), and approximately 1750 potential class members were identified. Prior to commencing individual hearings to determine actual class membership, the district court held evidentiary hearings and concluded that class members would be entitled to reinstatement. *Id.*

In 1980, the district court, mindful of the unique characteristics of this case, determined that individual evidentiary hearings before special masters appointed pursuant to Federal Rule of Civil Procedure 53 would be the most appropriate means of determining whether a particular claimant could demonstrate entitlement to class membership. (R. 416) Thus, on October 27, 1982, the district court issued an Order of Reference setting forth legal principles and evidentiary standards which the masters were to apply in formulating their individual reports and recommendations regarding class entitlement to the district court. (App. 35a, 3a) Consistent with footnote 4 in *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), quoted above, the Order of Reference (¶ 4) provides that each "claimant has the burden of proving that she is a member of the class." (App. 36a) Once a claimant makes a *prima facie* case for entitlement, the parties opposing the claim have the "*burden of going forward* with a showing that some reason other than the no-marriage rule led to the end of her employment as a flight attendant." (¶ 5, App. 36a; emphasis added) Paragraph 6 of the Order sets forth certain indicia (marriage concealment, transfer to ground job, subsequent work history, contemporaneous protest) suggesting a claimant left her flight attendant job because of the no-marriage rule. (App. 36a-37a) Para-

graph 7 lists other indicia (failure to apply for transfer to ground job, failure to seek other work, failure to apply for unemployment compensation, the existence of other reasons for termination) indicating a claimant's voluntary termination unrelated to the rule. (App. 37a)

On December 23, 1982, the AFA filed a motion to reconsider paragraph 5 of the Order of Reference, arguing that paragraph 5 should be eliminated and that the claimant's marital status at the time of termination or resignation merely be added as an additional factor to be considered under paragraph 6. (R. 681-682) United supported the AFA's motion. (R. 684) Neither the AFA nor United sought modification or clarification of paragraph 4 which places the burden of proving class membership upon the claimant. Although the class opposed the AFA's motion to reconsider, at no time prior to July 12, 1983 did the class ever object to or ask the court to modify, clarify or reconsider any portion of the Order of Reference pertaining to the burden of proof.[5] In ruling on the AFA's motion to reconsider, on May 19, 1983, the district court stated that "it certainly was not the intention that the plaintiffs could come in with a big stack of wedding licenses and say prove these people — or have the burden of going forward to show that they left for some other reason or some reason other than the rule." (R. 1239, Vol. 4 at 4-6) The court confirmed that pursuant to the Order of Reference "the burden of going forward, not the burden of persuasion" shifted to United once a claimant established a *prima facie* case, and that "the burden of proof always remains on the plaintiff." *Id.*

Eight "test" cases were tried the week of January 17, 1983 and decisions in these cases were rendered on February 18, 1983. The class entitlement hearings commenced on a regular

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[5] In sharp contrast to the class' failure to object to the burden of proof, the class on January 31, 1983 and May 19, 1983, did ask the court to reconsider and modify unrelated provisions of the Order of Reference, i.e., scheduling of hearings and cut-off dates. (R. 689, 826)

basis on April 18, 1983. Not until July 12, 1983, nearly 9 months after the Order of Reference was issued and 5 months after the first 8 decisions were rendered, did the class challenge the allocation of proof provisions in the Order. (R. 927) By that time, the special masters had conducted 126 entitlement hearings and had denied entitlement to some 38 claimants.

The class presented its challenge to the burden of proof provisions in the Order of Reference by appealing several of the masters' adverse recommendations. In these appeals, the class argued that, pursuant to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), once a claimant makes a *prima facie* showing, United has the burden of proving by clear and convincing evidence that its no-marriage rule was not the cause of claimant's termination. On September 9, 1983, the district court rejected the class' argument primarily on the ground that those flight attendants who resigned (as opposed to those who were discharged by United upon marriage) were similar to the nonapplicants in *Teamsters* who had the burden of proving that they were actual discriminatees and thus entitled to be treated like the rejected applicants who were presumptively entitled to relief. (App. 23a) Significantly, the district court concluded that:

> [T]he manner and burden of proof is not the same for all the varying circumstances in Title VII cases. It must be tailored to the realities of the case, including how the evidence could or would be presented. See *Teamsters v. United States, supra.* Given the nature of the hearings so far conducted, this court is satisfied that the structure suggested, but not mandated, by *Texas Department of Community Affairs v. Burdine, supra,* should continue to be followed. (App. 25a)

On the same date, the district court adopted the masters' adverse recommendations as to 11 claimants. (App. 27a) Appeals were taken from the adverse rulings to the Seventh

Circuit pursuant to 28 U.S.C. § 1292(a)(1) and Rule 54(b). (R. 1100) A second set of masters' adverse recommendations were adopted by the district court in orders of January 5, 1984 and February 1, 1984 (App. 29a-33a) and also appealed to the Seventh Circuit pursuant to 28 U.S.C. § 1292(a)(1) and Rule 54(b). (R. 1201) The two appeals were consolidated.

Contrary to petitioners' contention, the Seventh Circuit decision which petitioners are asking this Court to review contains no recognition "that a substantial issue was presented as to whether ... *Teamsters* ... or the *Burdine* decision, provided the appropriate model for allocation of the burden of persuasion here." (Pet. 7, 9) The Seventh Circuit did discuss both *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in the context of these particular class entitlement hearings and determined that neither *Teamsters* nor *Burdine* was directly comparable to this case. (App. 6a-9a) Agreeing with the district court's position, the Seventh Circuit stated:

> In the final analysis, it is perhaps most useful only to recall the maxim that each Title VII case may be unique to its own factual setting and therefore courts must be prepared to employ innovative procedural structures in facilitating the necessary determinations. (App. 8a)

Further, although the court of appeals affirmed the Order of Reference, finding the meaning of paragraphs 4 and 5 "abundantly clear," it chose not to review the merits of the Order in general because petitioners failed to timely challenge the Order. (App. 8a-9a) However, the court did review the application of the principles of the Order of Reference to nine specific cases, affirming six, reversing one, and remanding two. (App. 12a-17a)

ARGUMENT

I. THE SEVENTH CIRCUIT AFFIRMED THE ALLOCATION OF THE BURDEN OF PROOF AS APPLIED BY SPECIAL MASTERS UNDER THE DISTRICT COURT'S ORDER OF REFERENCE.

The petition for writ of certiorari rests entirely on the false premise that the Seventh Circuit opinion "deprives petitioners of appellate review concerning the correct burden of proof governing their individual reinstatement hearings." (Pet. 8) In fact, what the Seventh Circuit did was to consider and define with particularity the "appropriate procedures" to be followed "in facilitating the necessary determinations" in the entitlement hearings in *this* Title VII case—"unique to its own factual setting." (App. 10a-11a, 8a)

The special nature of class membership in this unique Title VII case calls for just the type of *ad hoc* definition of appropriate burden of proof procedures that the court of appeals' opinion provides. Here class membership turns, not just on the existence of some facts which can be objectively established (i.e., dates of employment, date of marriage), but on the establishment of a subjective state of mind existing many years ago. "The stewardesses who resigned must, as counsel for plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).[6]

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[6] The subjective nature of the testimony adduced at the entitlement hearings was pointed out by the district court:

> The claimants left service as flight attendants fifteen or more years ago. The hearings necessarily involve an exploration into what claimants then did, recollections quite possibly affected by time and by present desires. *They also involve what claimants otherwise would have done, absent the no-marriage rule, a present reconstruction of what one then would have done even though, the choice not then being present, the claimant may not have then*

(Footnote continued on following page.)

The following specific blueprint for allocation of the burden of proof in the entitlement hearings was drawn by the Seventh Circuit in its opinion:

> Once the claimant has met her initial burden, the burden of production shifts to the defendant to rebut the factual presumption that the claimant resigned because of the rule, although the ultimate burden of persuasion remains on the claimant ...
>
> ...[W]here United and AFA have not come forward with any evidence—whether based on extrinsic factors such as the claimant's subsequent employment history or on impeachment through cross-examination of the claimant herself—the defendant will have failed to rebut the presumption established by the claimant's prima facie case [from her demonstrating a temporal link between her termination as a stewardess and her marriage].
>
> * * *
>
> The master, of course, can make a determination that the claimant's professed past intention to continue her employment is not credible. Nevertheless, the master's determination should be based on specific evidence adduced by United or AFA, whether by cross-examination or otherwise. If such evidence is not available in any form, then the master should conclude that the defendant has failed to meet its burden, and thus failed to rebut the factual presumption that the claimant's resignation was the result of the no-marriage rule. (App. 10a-11a)

Nothing could constitute a more considered decision regarding petitioners' contention that United bears the ultimate burden of

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(Footnote continued on following page.)

consciously contemplated the alternatives. The masters have been faced with the difficult and uncertain task of determining what would have happened in the past had circumstances been different. While that determination may well not rest upon "credibility" in the narrow sense—a conclusion that someone was lying—it cannot be ignored that claimants are testifying to present subjective beliefs as to what they would have done in the somewhat distant past if they then had had alternatives. Such beliefs are obviously, despite the utmost good faith, subject to the twin distortions of time and self-interest. (App. 31a; emphasis added)

persuasion in the entitlement hearings. Each petitioner's case was thoroughly reviewed by the court of appeals. Petitioners' real complaint is not that their contentions were not considered but that the court of appeals after considering them, adopted, under the particular circumstances of this case, a burden of proof schemata which is contrary to petitioners' position and which follows that urged by United and applied by the district court and the special masters in all of the 673 entitlement hearings held to date.[7]

What the Seventh Circuit did not reach or consider—and properly so—was "the appropriateness of [the particulars of procedure set forth in the Order of Reference] in determinations of class membership in *future* Title VII cases . . . [*g*]*iven the unique characteristics of these claimants and their differences from the usual Title VII claimants* . . . " (App. 8a-9a, n. 3; emphasis added) Petitioners apparently believe themselves entitled to an abstract announcement of a set of broad principles governing Title VII class membership determinations in general. However, as the court pointed out in the above quotation, consideration on that level of petitioners' contentions concerning the proper allocation of the burden of proof is entirely inappropriate.[8]

In affirming the Order of Reference, the Seventh Circuit did specifically consider petitioners' arguments concerning the proper allocation of the burden of proof. In doing so, the court recognized, contrary to petitioners' contention, that the entitle-

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[7] As of this date, 673 hearings have been held; 445 have been found to be class members; 215 have been denied class membership; and 13 decisions are still pending. The class has filed objections to every adverse decision.

[8] Judge Eschbach, in his separate opinion, emphasized the above distinction between "that part of the court's opinion which affirms the district court's allocation of the burdens of proof and production" and "the decision not to review the merits of the Order of Reference" as a general matter. (App. 18a)

ment hearings are not "remedial" (Pet. 4, 6, 12) in nature. This unique Title VII class action has not followed the usual stage I-liability/stage II-remedial structure of other Title VII class actions. Although the no-marriage rule was long ago held to be discriminatory, United's liability with respect to each claimant is determined solely in the entitlement hearings. The remedial phase of this suit was tried on a class-wide basis at evidentiary hearings conducted in 1981 with respect to reinstatement and in 1982 concerning backpay. As the Seventh Circuit pointed out, the prior adjudication of the illegality of the no-marriage rule did not "identify exactly who was injured by this illegal conduct, and *only those who were in fact injured are entitled to relief.*" (App. 7a; emphasis added) Thus, the sole issue determined in the entitlement hearings is "who belongs to the plaintiff class, that is, who has been a victim of the proven discrimination." (App. 7a) The court of appeals' refusal to accept petitioners' characterization of the hearings as "remedial" is consistent with its conclusion that these claimants "are in fact directly comparable to neither group [applicants and nonapplicants] in *Teamsters.*" (App. 8a)[9] Thus, the court concluded that each Title VII case is unique to its own factual setting and "therefore courts must be prepared to employ

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[9] Accordingly, Petitioners' reliance on the post-*Teamsters* cases is misplaced. (Pet. 12, n. 9) Moreover, those cases are clearly distinguishable: *Association Against Discrimination v. City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982), and *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982), are hiring and promotion cases in which class-wide discrimination had already been established with respect to identifiable groups, and the courts were concerned primarily with the issue of remedies. *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir. 1983), *cert. denied,* ____U.S. ____, 104 S. Ct. 527 (1983), is a true "phase II—remedial" case in which class-wide liability had already been determined, leaving only the backpay claims to be resolved. Petitioners' reliance on *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763-64 (1976) (Pet. 12), is also inappropriate because the class entitlement hearings do not represent the remedial phase of this Title VII case.

innovative procedural structures in facilitating the necessary determinations." (App. 8a) Accordingly, the court of appeals approved the "innovative procedural structures" and the allocation of proof standards as applied under the Order of Reference in this unique case.

II. PETITIONERS FAILED TO MAKE TIMELY OBJECTION TO THE GENERAL STATEMENT OF THE BURDEN OF PROOF ALLOCATION IN THE ORDER OF REFERENCE, AS DISTINGUISHED FROM THE APPLICATION OF THAT ALLOCATION IN THE ACTUAL HEARINGS WHICH WERE APPEALED.

The Seventh Circuit made the following significant findings:

> It thus seems clear that the plaintiffs interpreted the Order of Reference to shift only the burden of production, and not the burden of proof, to the defendant once the claimant has made the threshold showing. This, of course, is consistent with paragraph 4 of the Order of Reference which explicitly states that the claimant has the burden of proving she is a member of the class. At no point prior to initiation of the appeals from the masters' determinations did the plaintiff class apparently challenge, even indirectly, paragraph 4 of the Order of Reference. (App. 5a-6a)

Further, the court found that paragraphs 4 and 5 of the Order of Reference were "abundantly clear" and that the district court's subsequent order "did not significantly change the allocation of burdens enumerated in the Order of Reference." (App. 8a-9a)

The record amply supports these findings. The class raised no challenge whatsoever to the burden of proof standard until almost 9 months after the Order of Reference was issued in October 1982. Inexplicably, petitioners now claim that they "consistently maintained" that the allocation of the burden of persuasion was "incorrect and highly prejudicial." (Pet. 15, n.

13) Yet, petitioners cannot point to one such objection made to the Order of Reference prior to the first set of consolidated appeals taken to the district court in July, 1983. Moreover, although petitioners contend that the allocation of the burden of proof is of "crucial importance" (Pet. 11) to them in the hearings, petitioners never sought to stay further hearings until the issue was reviewed on appeal and even opposed United's request for a stay. (R. 733) By the time this case was argued to the court of appeals, over 600 claims had been heard.[10] As the court of appeals concluded:

> [T]he class failed to object to the Order when it had ample opportunity to do so before the beginning of the individual hearings. . . . To permit the plaintiffs to wait to challenge the Order until after several hundred hearings have been held and then to attempt to force rehearings on those claims which received adverse recommendations does not further the goal of efficient judicial administration. (App. 9a)

Petitioners' argument is based on the false premise that the Seventh Circuit promulgated a broad new rule that parties in complex litigation have no choice but to "seek appellate review of clearly interlocutory orders issued during the case lest they find they have in the name of 'efficient administration of justice' lost their right to appellate review." (Pet. 8) Clearly, no such rule was announced by the Seventh Circuit. In fact, the court merely applied black letter law in the context of the unique circumstances in this case. The Seventh Circuit upheld the rule that a party who desires to challenge generally an order of reference must make an objection at or prior to the entry of the order of reference; or, at the very latest, the party must make a timely motion to the court, and not to the master, asking the court to revoke or modify the reference. In the absence of some such objection, proceeding before the master constitutes a

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[10] Contrary to petitioners' assertion (Pet. 15, n. 13), the issue of the class' failure to timely object to the Order of Reference was raised and argued at oral arguments before the court of appeals.

waiver of any potential objection to the reference. 5A *Moore's Federal Practice* ¶ 53.05[3] (2d ed, 1984); *Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981) (objection to reference first made at hearing before the special master was waived as untimely); *Magnaleasing, Inc. v. Staten Island Mall*, 428 F. Supp. 1039, 1045 (S.D. N.Y.), *aff'd* 563 F.2d 567 (2d Cir. 1977) (objection to reference under Rule 53(e) was untimely where not made until appearance before magistrate); *First Iowa Hydro Elec. Corp. v. Iowa-Illinois Gas & E. Co.* 245 F.2d 613, 628 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957) (failure to make timely objection to reference at time of the order or promptly thereafter constitutes a waiver of error and objections made only to the master are unavailing); *Coyner v. United States*, 103 F.2d 629, 635 (7th Cir. 1939) (failure to move before the trial court to revoke a reference is tantamount to acquiescence and consent); *See also, Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, ____ U.S.____, 105 S. Ct. 511 (1984); *Morgan v. Kerrigan*, 401 F. Supp. 270, 272 (D. Mass. 1975); *Ramsey v. Home Mortgage Co.*, 47 F.2d 621, 636 (E.D. N.C. 1931). The rule requiring that any objection to an order of reference be made promptly "permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain 'a second bite at the apple' by withholding his objection to the reference until after the report." *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

Petitioners raise other arguments in support of their petition, none of which satisfies the guidelines set forth in Supreme Court Rule 17 justifying the granting of the writ of certiorari. As stated above, the court of appeals did not announce a new rule requiring parties to seek review of all interlocutory orders. Therefore, there clearly is no conflict with "the historic federal policy against piecemeal appeals." (Pet. 8) Nevertheless, petitioners persist in arguing that the Seventh Circuit has undermined this policy by also reducing its appellate jurisdiction on an "ad hoc" basis. (Pet. 8-9, 13) However, the only case relied

upon by petitioners, *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955), does not support their contention. In that case, this Court held that an order denying a stay under the United States Arbitration Act is not the refusal of an interlocutory injunction within the meaning of 28 U.S.C. § 1292(1). In so holding, this Court stated that it is "the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction" occurs because such "choices fall in the legislative domain." 348 U.S. at 181-82. In this case, petitioners took appeals from the adverse rulings to the Seventh Circuit under 28 U.S.C. § 1292(a)(1) as orders denying them the injunctive relief of reinstatement. (R. 1100) The Seventh Circuit accepted jurisdiction on this basis (as well as under Rule 54(b)) and fully reviewed the underlying decisions including the application of the Order of Reference to each case. The court's refusal to review the Order of Reference in the abstract because petitioners failed to object promptly to the Order in general does not amount to an "ad hoc" reduction of appellate jurisdiction. Thus, petitioners have failed here too in demonstrating any conflict with the policy against piecemeal appeals.

Next, petitioners argue, on the one hand, that the Order of Reference was an unappealable, interlocutory order and, on the other hand, that they were not required to appeal the Order earlier than they did. (Pet. 9-11) In so arguing, petitioners sidestep the real issue. Inasmuch as the Order of Reference laid the ground rules for some 1750 potential hearings, there is little doubt that a timely objection to the Order followed by an appeal under the doctrine of *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 154 (1964) (28 U.S.C. § 1291: if "fundamental to the further conduct of the case") or a *mandamus* petition under the doctrine of *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259-60 (1957) (supervisory control over proper judicial administration when "exceptional circumstances" exist) would have succeeded in bringing this issue before the court of appeals for determination prior to the holding of more than 600 hearings completed as of the date of

the court of appeals' decision. The court properly considered the adverse consequences that a change in the general statement of the burden of proof standard at this late stage in the hearing process would have on "the goal of efficient judicial administration." (App. 9a) Such consideration was especially appropriate in light of the petitioners' inexcusable delay in objecting to the Order of Reference. *See Browzin v. Catholic University of America,* 527 F.2d 843, 850, n.15 (D.C. Cir. 1975); *Skogen v. Dow Chemical Co.,* 375 F.2d 692, 703 (8th Cir. 1967). That the district court "welcomed appellate review" (Pet. 7) at the time petitioners took this case to the Seventh Circuit is not dispositive, as petitioners would have this Court believe, of the question of efficient judicial administration. As the Seventh Circuit clearly recognized, the essentially declaratory and abstract relief which petitioners untimely requested would, if granted, severely disrupt the efficient judicial administration of this case.

Finally, petitioners delude themselves in arguing that this case raises "an important issue of the court of appeals' interference with the district court's management of complex litigation." (Pet. 13) In support of this contention, petitioners cite portions of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 375-76 (1977), and *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763, 770 (1976). However, these cases deal with the fashioning and implementation of appropriate remedies and clearly are inapplicable to entitlement hearings in which United's liability to individual claimants is the only issue. Moreover, the citations to *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8 (1980), and *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 474 (1978) add nothing to petitioners' argument since the court of appeals here did not dispute the district court's determination that their appeals were appropriate under 28 U.S.C. § 1292(a)(1) or Rule 54(b). Indeed, none of the other cases relied upon by petitioners supports their argument: In *Dayton Board of Education v.*

Brinkman, 433 U.S. 406, 418 (1977), the court of appeals improperly imposed a remedy "entirely out of proportion" to the constitutional violations found by the district court without upsetting the lower court's findings or conclusions of law. *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655 (1978), held that the issuance of a writ of *mandamus* by a court of appeals impermissibly interfered with the district court's discretion, established by prior case law, to defer to a concurrent state action. In *Curtiss-Wright, supra,* the issue was the standard of review exercised by the court of appeals in determining the propriety of Rule 54(b) certification. Finally, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), involved a court of appeals' reversal of a *forum non conveniens* determination which conflicted with every other federal court of appeals' decision on the issue.[11]

The Seventh Circuit was not bound by the district court's action permitting tardy, albeit abstract, review of the Order of Reference, particularly since such a review might have adversely affected efficient judicial administration. In refusing to review the Order in general because of the inherent prejudice in such review, the Seventh Circuit did not interfere with the district court's management of the case.

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[11] Petitioners also argue that because the district court found no procedural default, the appellate court should have reviewed the Order of Reference in general. However, in the case relied upon by petitioner, *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 257 (1981), this Court agreed to review a punitive damages question in a 42 U.S.C. § 1983 case because it was of broad significance to and likely to recur in 1983 litigation against municipalities. The same cannot be said of the issues in this clearly unique case.

CONCLUSION

Petitioners have advanced no valid reason justifying a review on writ of certiorari. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

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QUESTION PRESENTED

Whether, on the basis of the specific factual circumstances of this case, the Court below properly declined to modify the burden of proof standard adopted by the District Court and rejected petitioner's demand that all cases decided adversely to claimants be retried, when petitioner clearly understood the burden of proof standard and yet delayed mounting any challenge thereto before any court until after hundreds of trials had been held?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1412

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

STATEMENT OF THE CASE

A. The original underlying action was directed at a "no-marriage" rule maintained by United Air Lines ("United") which previously had been eliminated and declared illegal sex-based discrimination. 2a.[1] After Liane McDonald intervened, *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), a class was certified.

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[1] Citations of Opinions and Orders of the Courts below are to pertinent pages in Petitioner's Appendix ("a"). Other citations are to the record on appeal ("R." or "S.R.").

In 1978, the Court of Appeals held that claimants who resigned from United "must, as counsel for the plaintiff acknowledged . . . show that their retirement was involuntary and on account of the invalid rule to be entitled to relief," *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), and that the burden of establishing entitlement would be more difficult for those who, unlike the original plaintiffs, had resigned without demonstrable protest. *Id.*

On remand, the Association of Flight Attendants ("AFA") intervened to represent the incumbent flight attendants. With the concurrence of all parties, the District Court first resolved the classwide reinstatement/seniority issues. Following a trial under the guidelines of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 727 (1976), the Court concluded that claimants who could establish that they left United involuntarily because of the no-marriage rule would be eligible for reinstatement with full retroactive seniority for compensation and benefits, but with partial retroactive seniority for competitive purposes, because full competitive seniority would cause unprecedented "unusual adverse impact" to incumbents and therefore could not equitably be awarded. *Romasanta* v. *United Air Lines, Inc.*, 27 EPD ¶ 32,353 (N.D. Ill. 1982). McDonald promptly obtained interlocutory review pursuant to 28 U.S.C. § 1292(b). The Court of Appeals affirmed in all respects, concluding, *inter alia*, that, consistent with *Franks*, the class had been awarded the fullest possible relief which would not result in unusual adverse impact to incumbents. *Id.*, 717 F.2d 1140, 1157, 1159-60 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1928 (1984).

In conformance with *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 371, 376 (1977), the District Court directed that individual entitlement hearings be held before special masters pursuant to an Order of Reference. 34a-40a. Paragraph 4

of that Order provides that "[t]he claimant has the burden of proving that she is a member of the class," 4a, 36a; paragraph 5 provides that, upon proof that a claimant was married within 90 days of her resignation from United, "the burden of going forward" shifts to those opposing reinstatement. 4a; 36a.

No party challenged the burden of proof standard of paragraph 4 of the Order of Reference. Prior to commencement of any entitlement hearings, AFA moved to reconsider paragraph 5, urging that a claimant's marital status contemporaneous with resignation should only be an additional factor providing "some indication" as to the cause of resignation, under paragraph 6 of the Order. 5a. McDonald's opposition to the motion, quoted in the decision below, explicitly recognized that regardless of any shift in the burden of production, "*the burden of persuasion* that the termination is because of the [no-marriage] rule *stays on the claimant.*" 5a (emphasis added).

The District Court, orally ruling upon AFA's motion, held that the mere showing of marriage within 90 days of termination would be insufficient to shift even the burden of going forward, S.R.1239, Vol. 4 at 4-5, and reiterated that, in accordance with paragraphs 4 and 5 of the Order of Reference, only "the burden of going forward, not the burden of persuasion," shifted to defendant once a claimant "has made a prima facie case," *id.* at 5; "the burden of proof always remains on the plaintiff." *Id.* at 6.

It was not until nearly nine months after issuance of the Order of Reference and after hundreds of entitlement hearings that McDonald first challenged the Order's burden of proof standard in conjunction with her request that the District Court review the masters' rulings in ten individual entitlement cases. 9a; 5a-6a; R.927. The District Court adhered to the requirement

of the Order of Reference that claimants bear the burden of proving entitlement, 22a-23a, and rejected McDonald's claim that the masters had applied fixed evidentiary rules to determine entitlement. 23a-24a.

While McDonald claimed that modification of the burden of proof standard would require rehearings of all entitlement decisions adverse to claimants, 9a; 21a-22a, she opposed any stay of entitlement hearings, R.733; S.R.1239, Vol. 5, and deferred processing her appeal before the Seventh Circuit until the District Court reviewed additional individual entitlement decisions. 2a-3a; 29a-33a. By the time the burden of proof issue was considered by the Court of Appeals, over 600 entitlement hearings had been held. 9a; S.R.1266-1288.

B. The Court of Appeals held, as it had in 1978, that "resignees must carry the burden, in order to be considered class members, of proving that they did resign involuntarily," 6a n.2, for "only those who were in fact injured are entitled to relief." 7a. Recognizing that "each Title VII case may be unique in its own factual setting," 8a, and finding that neither *Teamsters* nor *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), fit the circumstances presented, the Court directed its focus to the "unique . . . factual setting" of this case. 6a-8a.

The Court of Appeals found the distinct burdens of proof and production of paragraphs 4 and 5 of the Order of Reference "abundantly clear," 8a, and never altered by the District Court. 9a. Nevertheless, although it was "clear that the plaintiffs interpreted the Order of Reference to shift only the burden of production, and not the burden of proof, to the defendant once the claimant has made the threshold showing," 5a, McDonald "failed to object to the Order when [she] had ample opportunity to do so before the beginning of the individual hearings," and "wait[ed] to challenge the Or-

der until after several hundred hearings ha[d] been held." 9a; 5a-6a. The Court concluded that under such circumstances, to suddenly alter the burden of proof and permit McDonald to "force rehearings" of the hundreds of entitlement decisions adverse to claimants would "not further the goal of efficient judicial administration," 9a, in this already "long and tortuous" litigation. 1a. Turning to McDonald's challenge to the application of the principles of the Order of Reference in nine individual cases, the Court of Appeals affirmed six, remanded two for further fact-finding, and reversed one. 11a-17a. McDonald's Petition for Rehearing was denied. 86a-87a.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Appellate Court's Acceptance of the Burden of Proof Standard Established by the District Court and Applied, Without Objection, in Hundreds of Cases, Is Consistent With Rulings of This Court and Other Circuits and Does Not Merit Supreme Court Review.

A. The petition rests on the erroneous premise that the decision below enunciates a general "rule" or "policy" requiring "parties in complex litigation" to pursue piecemeal appeals from interlocutory orders or forfeit their right to appellate review. Petition ("Pet."), pp. 8-13. The ruling does nothing of the kind; it is grounded in and limited to the "unique . . . factual setting" of this case, 8a, which revealed the clear inequity of permitting McDonald to secure retrials of hundreds of cases when such drastic consequences could have been avoided had McDonald promptly challenged the "abundantly clear" burden of proof standard, 8a, which governed the conduct of those trials. This fact-based ruling does not merit Supreme Court review.

The Court of Appeals properly found that McDonald was aware from the time the District Court issued its Order of Reference that the Order "shift[ed] only the burden of production, and not the burden of proof," to

defendant once a claimant established a prima facie case and that the ultimate "burden of persuasion" always "stays on the claimant." 5a. Despite the fact that the District Court never altered that standard, 9a, McDonald mounted no challenge to the burden of proof "until after several hundred hearings [had] been held." *Id.*[2] Even after the District Court rejected her tardy challenge, she resisted any stay of entitlement hearings and deferred processing her appeal, so that by the time the Court of Appeals considered the matter, over 600 hearings had been held. S.R.1266-1288. It was these specific factual circumstances, not some broad "rule," which prompted the Court to reject McDonald's attempt to modify the Order of Reference and "force rehearings" of hundreds of entitlement claims. 9a.

The Court's careful analysis of the record negates McDonald's assertion that her appeal was rejected as "unreviewable." Pet., pp. 7, 11, 13. On the contrary, the Court considered the issues presented and, taking into account the specific factual circumstances, refused to alter the burden of proof established by the District Court, affirming, reversing, and remanding the various matters appealed. 3a.

B. McDonald's suggestion, Pet., pp. 8-11, 13, that this fact-based ruling "places in peril all claimants" and threatens the policy against piecemeal appeals, ignores the purposes of that policy and the basis for the ruling below.

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[2] McDonald's contention that the burden of proof standard was under continued reconsideration and modification, making an earlier challenge "premature," Pet., pp. 4, 6, 9-10 and n.7, 14, is rejected by the record. 9a. Moreover, the District Court's September, 1983 Opinion, which contains the only alleged modification McDonald cites, not only fully "reject[ed] the contentions advanced by plaintiffs," 21a, but followed, and hence could not possibly have prompted, McDonald's belated challenge to the burden of proof standard. R.927.

The Seventh Circuit's decision nowhere postulates that McDonald was obligated to have initiated interlocutory appeals, even from the Order of Reference; perforce, it does not "unsettle" any "longstanding black letter rules," Pet., p. 9, by creating a general requirement that litigants pursue interlocutory appeals.[3] Instead, the Court held that McDonald could not allow hundreds of trials to take place under an "abundantly clear" burden of proof standard, 8a, without mounting *any challenge* before *any* court, then suddenly insist that the established standard was erroneous and that all entitlement cases lost by claimants must be retried.[4] The Court's determination finds its basis in the same "interest of sound judicial administration," *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956)), which underpins the policy against piecemeal appeals. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 178 (1955), cited in Pet., pp. 8-10. *Cf.* 9a.

Similar concern for the "proper and efficient administration of the judicial process," *Cruz* v. *Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976), has prompted appellate courts to consistently re-

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[3] McDonald's present disparagement of interlocutory appeals and motions for reconsideration, Pet., pp. 10-11 and n.8, contrasts with her repeated prior resort to such avenues to obtain immediate review of District Court rulings, *see, e.g.*, 717 F.2d at 1144 (§ 1292(b) appeal of seniority/reinstatement decision, following unsuccessful motion to reconsider); 587 F.2d 357 (§ 1292(b) appeal from class certification decision), including review of provisions of the Order of Reference. R.689 (motion to modify Order of Reference regarding scheduling of hearings); R.826 (motion to reconsider cut-off dates in Order of Reference).

[4] In contrast, in *Franki Foundation Co.* v. *Alger-Rau & Associates, Inc.*, 513 F.2d 581 (3d Cir. 1975) and *Sherrill* v. *Royal Industries, Inc.*, 526 F.2d 507 (8th Cir. 1975), Pet., p. 11 n.8, appellants promptly apprized the District Courts of alleged errors.

fuse to vacate district court referrals of matters to masters when no objections to the references were raised prior to the parties proceeding before the masters. *E.g., id.*; *Rogers* v. *Societe Internationale, Etc.*, 278 F.2d 268 (D.C. Cir. 1960); *Diamond Door Co.* v. *Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1205-06 (9th Cir. 1974); *Coyner* v. *United States*, 103 F.2d 629, 635 (7th Cir. 1939); *Hayes* v. *Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981); *Spaulding* v. *University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, 105 S.Ct. 511 (1984); *see also Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976) (attack upon bifurcation order rejected when "nothing was done" to object before trial commenced). The fact that litigants retain the "right" to appeal from interlocutory referral orders when final orders issue,[5] Pet., pp. 10-11, does not foreclose the courts from "locat[ing] 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975) (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)). *Cf. Cannon* v. *University of Health Sciences/The Chicago Medical School*, 710 F.2d 351, 357-63 (7th Cir. 1983) and *Avondale Shipyards, Inc.* v. *Vessel Thomas E. Cuffe*, 434

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[5] *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Trustees of Joint Welfare Fund of Int'l Union of Operating Engineers* v. *Nolan*, 549 F.2d 871 (2d Cir. 1977); *Mabey* v. *Reagan*, 537 F.2d 1036 (9th Cir. 1976); and *United States* v. *Cline*, 388 F.2d 294 (4th Cir. 1968), Pet., p. 9, involved no challenges to orders of reference, and in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), the reference order was entirely peripheral to the issues on appeal. Moreover, unlike *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228 (5th Cir. 1982), Pet., p. 11, where the particular interlocutory order had not "disposed of the issues now before us," 669 F.2d at 235, and no action had been taken in the litigation between the interlocutory order and the order then on appeal, the Order of Reference in the present case fully disposed of the burden of proof issue and was followed by hundreds of trials. Moreover, as in *Chicken*, the Court below considered its decision "necessary for the efficient administration" of the particular case. *Compare* 669 F.2d at 235 *with* 9a.

F. Supp. 920, 934 (E.D. La. 1977) (dismissing belated claims on laches grounds even though time to proceed not yet extinguished by statutes of limitations).

The ruling below is fully consistent with these authorities. To permit McDonald "to hang back at the trial level," *Thompson* v. *Sawyer*, 678 F.2d 257, 287 (D.C. Cir. 1982), and then, after hundreds of entitlement claims have been decided, insist on a "second bite at the apple," *Cruz*, 515 F.2d at 331, because of an allegedly improper burden of proof, "is a trap play," *Thompson*, 678 F.2d at 287, which the Court of Appeals was not required to accept, particularly where, as here, prompt objection to the District Court's Order could have obviated any need for retrials. *E.g.*, *Rogers* v. *Societe Internationale*, 278 F.2d at 271; *Ellis* v. *City of Chicago*, 667 F.2d 606, 610 (7th Cir. 1981); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967). The Court's authority to take account of such considerations was no less because the issue involved was the appropriate burden of proof. *Browzin* v. *Catholic University of America*, 527 F.2d 843, 849-50 (D.C. Cir. 1975) (declining to alter the allocation of burden of proof, even though appellant's position, if timely advanced, might well have been meritorious). *See also Brenner* v. *World Boxing Council*, 675 F.2d 445, 456 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).[6]

The Court of Appeals' determination to retain the burden of proof of the Order of Reference and not permit

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[6] McDonald's suggestion that the Court below was under a different "obligation" because this is a Title VII case, Pet., p. 12, is misguided. The present appeals involved issues of eligibility for relief, not the measure of the relief to be afforded. When the remedial issues were before the Court, it fully recognized and applied the principles of *Franks*. 717 F.2d at 1157, 1159-60.

Similarly inappropriate is McDonald's suggestion that the Court should have insisted upon a different burden of proof for the remaining entitlement hearings from that applied in the 650 cases which have already been heard. Pet., pp. 12-13. There is no rationale for having different standards of proof govern this unitary claimant group.

multiple retrials does not reflect any "restriction of appellate jurisdiction." Pet., pp. 8-9. Assertion of jurisdiction did not dictate the Court's substantive treatment of McDonald's appeals, require that it ignore the pertinent facts in fashioning a result it considered "just under the circumstances," 28 U.S.C. § 2106, or render it powerless to protect the integrity of the judicial system from the consequences of McDonald's dilatory conduct.[7] *Cf. Williams* v. *Rhodes*, 393 U.S. 23, 34-35 (1968), *Kay* v. *Austin*, 621 F.2d 809, 813 (6th Cir. 1980), and *USAchem, Inc.* v. *Goldstein*, 512 F.2d 163, 168-69 (2d Cir. 1975) (upholding denials of relief because of tardiness of plaintiffs, although trial court rulings were based on other grounds). No case cited by McDonald suggests otherwise.[8]

C. While McDonald does not directly ask this Court to determine the appropriate burden of proof standard, the petition suggests that review is needed because the standard established by the Order of Reference allegedly conflicts with *Teamsters* and its progeny. Pet., pp. 11-12 and n.9, 13. However, *Teamsters*, far from creating an inflexible formulation regarding burden of proof, instructed that different standards would apply to different categories of claimants based on the nature of their claims, even where the employer's wrongdoing had already been established. 431 U.S. at 364, 367-71.[9] In con-

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[7] AFA's challenge to appealability under 28 U.S.C. § 1292(a)(1) did not "acknowledge," Pet., p. 12, that the substantive disposition of a later appeal would differ in any respect from the ruling below.

[8] In *Baltimore Contractors*, Pet., p. 9, the Court rejected an effort to enlarge, not restrict, appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

[9] Cases following *Teamsters*, such as *McKenzie* v. *Sawyer*, 684 F.2d 62 (D.C. Cir. 1982) and *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), Pet., p. 12 n.9, have also drawn distinctions in the showing required of claimants based upon the nature of the claims presented, as the District Court correctly noted. 23a.

formance with these guidelines and the 1978 ruling of the Court of Appeals, *McDonald*, 587 F.2d at 360 n.4, the District Court established a burden of proof standard "tailored to the realities of the case," 25a, requiring claimants to establish that their resignations were involuntary. The Court of Appeals reiterated its earlier requirement that resignees bear the burden of showing their entitlement, 6a n.2, recognized the need to take account of the "unique . . . factual setting" in this case, 8a, and did so in its decision.[10]

II. The Court Below Took No Action Regarding the District Court's Management of This Case Which Merits Supreme Court Review.

The Court of Appeals in no way "interfered with," "undercut," or displayed disrespect for the District Court's management of this case, as McDonald claims. Pet., pp. 13-15. It confirmed the District Court's decision that entitlement be determined through individual hearings before special masters under standards established in the Order of Reference.[11] When appeals were filed, the Court below did not decline jurisdiction, as in *Curtiss-Wright Corp.*, Pet., p. 14, but accepted the "dispatch" of the District Court, heard and decided the appeals. And unlike *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), and *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), Pet., p. 15, where appellate courts improperly

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[10] Despite the alleged erroneous standard of proof, claimants have been found entitled in over two-thirds of the decided cases. S.R.1266-1288.

[11] McDonald's depiction of a district court "management plan" involving "continuing review and refinement of the Order of Reference in light of the experience in actual hearings," Pet., p. 14, is unfounded. The District Court never altered its burden of proof standard. 9a.

altered orders or actions of the trial courts,[12] the Seventh Circuit did not modify the Order of Reference. It was McDonald's unnecessary and prejudicial delay in challenging the burden of proof standard, not the case management of the District Court, which met with the Court of Appeals' disapproval.

McDonald also errs in inflating certain comments of the District Court, following its rejection of McDonald's tardy challenge to the burden of proof, into an endorsement of the timing of McDonald's attack on the Order of Reference or a "welcome[] [of] appellate review as and when sought by petitioners." Pet., p. 12; also pp. 7, 14. The District Court merely (and understandably) indicated that any further challenge to the standard of proof be pursued on appeal. S.R.1239, Vol. 6 at 8. That the District Court reconfirmed its Order of Reference when reviewing appeals from individual entitlement determinations rather than simply refusing to address the burden of proof issue did not, as McDonald argues, Pet., p. 15 and n.12, require the Court of Appeals to ignore the timing of McDonald's challenge.[13] *See, e.g., Retail Store Employees Union, Local 782* v. *Sav-on Groceries*, 508 F.2d 500, 503 (10th Cir. 1975) (reviewing court can decline

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[12] In *Piper*, the Court of Appeals reversed a dismissal on forum non conveniens grounds; in *Will*, the appellate court ordered the trial court to proceed immediately with an action it had deferred; in *Dayton*, the Court of Appeals, without record support, ordered a remedy far more sweeping than that ordered by the district court.

[13] McDonald erroneously suggests, Pet., p. 15 n.13, that the Court below sua sponte injected the concern for the timing of McDonald's attack on the burden of proof. AFA apprized the Court of Appeals, as it had the District Court, of McDonald's extensive delay in challenging the burden of proof standard and its potentially adverse consequences, given her demand for rehearings of all adverse entitlement determinations. AFA brief to Court of Appeals, pp. 6, 11-12 and nn.9 and 10, 21 n.21; R.945, p. 7 n.7; *see* McDonald reply brief to Court of Appeals, pp. 5-6. The issue was also specifically addressed at oral argument before the Court of Appeals.

to address basis for trial court ruling, yet affirm result); *Arlinghaus* v. *Ritenour*, 622 F.2d 629, 638 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980) (appellate court can raise decisive theory sua sponte). *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), and *Commissioner* v. *Gordon*, 391 U.S. 83 (1968), Pet., p. 15 n.12, suggest only that a reviewing court may decide an issue despite a procedural defect at the trial court level, not that it must ignore such defect or the factual circumstances of the case in reaching the decision it considers appropriate. Moreover, in neither *Fact Concerts* nor *Gordon* would a decision on the merits necessitate retrial; here, granting the relief sought by McDonald would have required hundreds of rehearings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

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Respondents.

REPLY OF PETITIONER TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. The brief in opposition of United Air Lines at once contends that the Seventh Circuit decided the merits of the burden of proof issue (Br. in Opp. 7) and that the Court of Appeals was justified in not doing so (Br. in Opp. 9). United's two contentions are inconsistent and each is erroneous. The Seventh Circuit, contrary to United's assertion (Br. in Opp. 7), explicitly held that it would not consider petitioners' challenges to the Order of Reference's allocation and quantum of proof. Thus, the court below characterized its action as "not reaching the merits of the Order of Reference." (Op. at 9, n.3, 2 App. 9a). The question raised by the petition—can petitioners be deprived of their right to appellate review concerning the correct burden of proof governing their individual reinstatement hearings—is squarely presented.

2. The approach of the AFA (Br. in Opp. 5) in attempting to characterize the proceedings below and to deny that significant questions are presented by this petition only demonstrates why great latitude must be given to district courts on matters like these.[1] The AFA attempts (Br. in Opp. 8) to analogize this to a case in which an Order of Reference to a master was made, no party objected to the fact of reference before or after until an appeal was taken on the merits, and a waiver of objection to the fact of reference was found. As AFA knows, and the district court appreciated, this case is not remotely comparable. What is involved here is an appeal from particular substantive terms of an Order of Reference. Those terms—as the Court of Appeals for the Seventh Circuit now reads them—are inconsistent with the position plaintiffs took *before* the Order of Reference was entered[2] (and continued to take after its entry[3]) that

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[1] Indeed, *Rogers v. Society International, Etc.*, 278 F.2d 268, (D.C. Cir. 1960), on which respondent AFA would rely (Br. in Opp. 8), expressly accords (at 271) the district court the widest latitude in the management of proceedings referred to a master in affirming the district court's decision not to vacate an order of reference even though it had proceeded for more than 10 years.

[2] In contrast to the cases relied upon by the respondents (UAL Br. in Opp. 13, AFA Br. in Opp. 8) where the district court had never been informed of the opposition to the reference until appeal, here the court was thoroughly informed of the arguments over the terms of the reference order before its entry. The district court referred the parties' proposals on the Order's terms to the special master for preliminary review and recommendation. (R. 557.) After the master had adopted the petitioners' suggestions on the allocation of the burden of proof, the AFA and United challenged the recommendation. (R. 575, 576.) Over petitioners' arguments that the recommended language was correct, the district court issued the Order in its present form. (R. 577, App. 34a.)

[3] Thus, petitioners expressly articulated their burden of proof contention at the outset of the hearings before the master. (R. 1239 at 9-11.) Neither United nor the AFA asserted that the petitioners had not procedurally perfected their contentions. To the contrary, counsel for United characterized the argument regarding the burden of proof as a "waste of time," because the matter was pending before the court on AFA's motion for reconsideration. (R. 1237 at 14.)

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), not *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1977), governed the burden of proof.

The AFA seeks to obscure, but does not deny, the fact that plaintiffs' position was taken *before* the Order of Reference was entered. The Seventh Circuit, however, concluded that petitioners should have taken some unspecified additional step—such as objecting to the Order once entered or appealing at an earlier time—after the Reference was entered. The court's holding overlooked that plaintiffs had persisted in their position on the burden of proof issues after the Order was entered. More importantly for present purposes, with the position indisputably advanced before the Order was entered, the issue presented in the petition is squarely raised.

3. Since the district court was fully apprised of the petitioners' position on the burden of proof before the Order was entered the "trap play" claim of the AFA (Br. in Opp. 9) is simply untrue. Also, it is not a trap play to raise on appeal a point decided against a party at an interlocutory stage of a case after final judgment.[4] Moreover the district court never found that the issue was "held back" (id.) but instead it fully reconsidered its ruling on the matter even though the hearings were underway and even though it knew that, if it had originally been wrong, a number of rehearings would be required. (S.R. 1239, Vol. 6 at 8-9, Tr. Nov. 3, 1983.)

[4] Petitioners in fact did not await the entry of a final judgment, but prosecuted this appeal on an interlocutory basis from the first orders of the district court affirming the masters' adverse recommendations in individual cases. The AFA ignores the facts that both it and United opposed the request, and instead both urged that the appellate challenge on the burden of proof issue await the completion of all the entitlement hearings. (R. 1239, Vol. 5, pp. 6-7, 16-18, Tr. Oct. 6, 1983.)

Certiorari should be granted here so that (a) inappropriate restrictions on appellate jurisdiction can be rejected, and (b) this court can reassert the principle that appropriate deference must be given to the district court actually managing complex litigation and attempting to fashion appropriate relief.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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